

Juvenile Law Section

STATE BAR OF TEXAS



Volume 28, Number 3 September 2014

Visit us online at
www.juvenilelaw.org



NEWSLETTER EDITOR

Associate Judge Pat Garza
386th District Court
San Antonio, Texas

OFFICERS AND COUNCIL MEMBERS

Laura Peterson, Chair

Humphreys & Peterson PLLC
5502 Broadway, Garland, TX 75043

Kevin Collins, Chair-Elect

Vogue Building, 600 Navarro, Ste. 250
San Antonio, TX 78205

Riley Shaw, Treasurer

Tarrant County District Attorney's Office
401 W. Belknap
Ft. Worth, TX 76196

Kameron Johnson, Secretary

Travis County Public Defender's Office
P.O. Box 1748
Austin, TX 78767

Richard Ainsa, Immediate Past Chair

Juvenile Court Referee, 65th District Court
6400 Delta Drive, El Paso, TX 79905

Terms Expiring 2015

Ann Campbell, Houston
Michael O'Brien, Dallas
Kaci Sohr, Austin

Terms Expiring 2016

Kin Brown, Ft. Worth
Anne Hazlewood, Lubbock
Lisa Capers, Austin

Terms Expiring 2017

Patrick Gendron, Bryan
Jill Mata, San Antonio
Mike Schneider, Houston

QUICK LINKS

[Juvenile Law Section Website](#)
[Nuts and Bolts of Juvenile Law](#)
[State Bar of Texas Website](#)
[State Bar of Texas Annual Meeting](#)
[Texas Bar CLE](#)

Dear Juvenile Law Section Members:

Welcome to the e-newsletter published by the Juvenile Law Section of the State Bar of Texas. Your input is valued so please take a moment to [email us](#) and tell us what you think of the new format.

The "Review of Recent Cases" includes cases that are hyperlinked to Casemaker, a free service provided by [TexasBarCLE](#). To access these opinions, you must be a registered user of the [TexasBarCLE](#) website, which requires creating a password and log-in. If you do not wish to receive emails from TexasBarCLE, you can opt-out of their email list.



TABLE OF CONTENTS

Editor's Foreword	3
Photos from Nuts and Bolts Conference	4
Chair's Message	5
Save the Date: Juvenile Law Conference	5
Riley v. California and Cell Phone Searches in Schools	6
Review of Recent Cases	9

By Subject Matter

Collateral Attack	9
Disposition Proceedings	9
Evidence	15
Modification of Disposition	19
Search & Seizure	22
Sufficiency of the Evidence	26
Waiver and Discretionary Transfer to Adult Court	50

By Case

A.J.R.P., In the Matter of , No. 04-13-00734-CV, ___ S.W.3d. ___, Juvenile Law Newsletter ¶ 14-3-7 (Tex.App.—San Antonio, 7/16/14)	15
A.K.A., In the Matter of , MEMORANDUM, No. 04—13—00666—CV, 2014 WL 2601731 Juvenile Law Newsletter ¶ 14-3-5 (Tex.App.—San Antonio, 6/11/14)	19
C.A.G., In the Matter of , MEMORANDUM, No. 04-13-00686-CV Juvenile Law Newsletter ¶ 14-3-10 (Tex.App.—San Antonio, 7/9/14)	9
D.A.B., In re , MEMORANDUM, No. 12—14—00147—CV, 2014 WL 2609722 Juvenile Law Newsletter ¶ 14-3-4 (Tex.App.—Tyler, 6/11/14)	9
J.D.H.M., In the Matter of , MEMORANDUM, No. 04—13—00235—CV, 2014 WL 1089748	

Juvenile Law Newsletter ¶ 14-3-3 (Tex.App.—San Antonio, 3/19/14)	11
<u>J.M., In the Matter of</u> , No. 05-14-00055-CV, __ S.W.3d __, 2014 WL 2134539	
Juvenile Law Newsletter ¶ 14-3-1 (Tex.App.—Dallas, 5/22/14)	12
<u>Lewis v. Nolley</u> , No. PD—0833-13, PD—0999-13, 428 S.W.3d 860	
Juvenile Law Newsletter ¶ 14-3-2 (Tex. Crim. App., 4/30/14)	14
<u>M.A.S., In the Matter of</u> , No. 08—13—00085—CV, 2014 WL 2881561	
Juvenile Law Newsletter ¶ 14-3-6 (Tex.App.—El Paso, 6/25/14)	20
<u>Moore v. State</u> , No. 01-13-00663-CR, --- S.W.3d ---, 2014 WL 3673551	
Juvenile Law Newsletter ¶ 14-3-11 (Tex.App.-Hous. (1 Dist.), 7/24/14)	50
<u>Palacios v. State</u> , No. 13-11-00254-CR, --- S.W.3d ---, 2014 WL 3778170	
Juvenile Law Newsletter ¶ 14-3-12 (Tex.App.-Corpus Christi, 7/31/14)	26
<u>Riley v. California</u> , No. 13–132, 573 U.S. ____	
Juvenile Law Newsletter ¶ 14-3-9 (On Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One, 6/25/2014)	22
<u>V.G.V., In the Matter of</u> , MEMORANDUM, No. 03—13—00335—CV, 2014 WL 1362646	
Juvenile Law Newsletter ¶ 14-3-8 (Tex.App.—Austin, 4/1/14)	18

EDITOR'S FOREWORD By Associate Judge Pat Garza

As mentioned previously I am the new Historian for our section. I don't know if that's a good thing but I will try to do my best to keep a running record of our sections activities and functions. Our latest sponsored event was last month's Nuts and Bolts Conference followed by an executive meeting of the Juvenile Law Council, both in Austin. It was an enjoyable conference and I tried to take a few pictures without appearing to be paparazzi in everyone's way. I realize I probably need to be a little more mobile and have a little more imagination in taking these photographs, but as they say, it's a process. Any photographer interested in helping with taking photos at our events please contact me. Oh, and if you have photographs of previous Juvenile Law Section events please do not hesitate to send them to me.

Riley v. California. I have included an article on the recent United States Supreme Court ruling in Riley v. California and its impact on school cell phone searches.

Elections. The council plans to have elections for council and officer positions in connection with our February conference. That means under State Bar rules the slate of nominees must be published in the December issue of this newsletter. If you have ideas for council members or officers, please contact Richard Ainsa, Nominations Committee Chair at (915) 849-2552 or Laura Peterson at (972) 303-4529 on or before October 15.

27th Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's Juvenile Law Institute will be held on February 16-18, at the Worthington Renaissance Hotel in Ft. Worth, Texas. Chair-Elect Kevin Collins and the planning committee are already working on putting together an excellent and practical conference. This will be a special conference as we celebrate the ten year anniversary of the passing of Professor Robert Dawson, our conferences namesake. Registration information will be sent out and available online at www.juvenilelaw.org in October.

*I believe in pink.
I believe that laughing is the best calorie burner.
I believe in kissing, kissing a lot.
I believe in being strong when everything else seems to be going wrong.
I believe that happy girls are the prettiest girls.
I believe tomorrow is another day and I believe in miracles.*

Audrey Hepburn

2014 NUTS AND BOLTS CONFERENCE, August 11-12, 2014 Austin, TX



Ann Hazzlewood



Kevin Collins & Kameron Johnson



Riley Shaw



The entertaining Judge Mike Schneider



TJJD Staff keeps everything moving



BREAK TIME



BEXAR COUNTY JUVENILE PROBATION

CHAIR'S MESSAGE By Laura A. Peterson

The Nuts and Bolts of Juvenile Law Conference was this week. I would like to thank all of the speakers, the planning committee and the attendees for a successful conference. We would also like to acknowledge the efforts of local bar associations putting on juvenile conferences as well. When we began the Nuts and Bolts conference it was one of a kind and the only venue to receive basic instruction on juvenile law. We are proud that there are many regional conferences teaching these basic skills to new attorneys. If your local bar association is planning a conference specific to juvenile law, contact us as we are always happy to post your brochure on the juvenile law website.

Speaking of websites, we are gearing up to do some exciting things with ours. We are currently exploring ways to make our website user friendly, more informative and sure to give you all of the information you need to be successful in your practice. Stay tuned and keep checking in. We believe this is going to become a great member benefit in the near future.

Moving forward, it is exciting to announce that the Robert O. Dawson Juvenile Law Institute 28th Annual Juvenile Law Conference will be February 16-18, 2015 at the Worthington Renaissance Hotel in Fort Worth. The planning committee has been hard at work making sure the topics and speakers appeal to both experienced and new practitioners. Make plans to attend.

"All labor that uplifts humanity has dignity and importance and should be undertaken with painstaking excellence."
~ Martin Luther King, Jr.

Happy Labor Day!



Juvenile Law Section of the State Bar of Texas

**SAVE
— THE —
DATE**

28th Annual Juvenile Law Conference

Robert O. Dawson Juvenile Law Institute

February 16 – 18, 2015

The Worthington Renaissance

Fort Worth, Texas

Conference Details and Registration Information will be distributed
and posted online at www.juvenilelaw.org in late October.

Sponsors and Exhibitors

This conference brings together over 500 juvenile justice professionals statewide. This year, the Juvenile Law Section is offering a variety of opportunities for your organization to take part in the 28th Annual Juvenile Law Conference through exhibiting at or sponsoring this great conference. If you are interested or need additional details, please feel free to contact Susan Clevenger at gtclevenger@yahoo.com or 281.580.4501.

RILEY v. CALIFORNIA AND CELL PHONE SEARCHES IN SCHOOLS By Associate Judge Pat Garza

On June 25, 2014 the United States Supreme Court, in **Riley v California**ⁱ, ruled that police may not generally search the cell phones of people they arrest without first getting a search warrant. David Riley had been stopped for a traffic violation, which eventually led to his arrest on weapons charges. An officer who searched Riley incident to arrest seized a cell phone from Riley's pants pocket. The officer then accessed information on the phone and noticed the repeated use of a term associated with a street gang. At the police station two hours later, a detective specializing in gangs further examined the phone's digital contents. Based in part on photographs and videos that the detective found, the State charged Riley in connection with a shooting that had occurred a few weeks earlier and sought an enhanced sentence based on Riley's gang membership. Riley moved to suppress all evidence that the police had obtained from his cell phone. The trial court denied the motion, Riley was convicted, and the California Court of Appeals affirmed the conviction.

The Supreme Court of the United States, in a unanimous decision, reversed, stating that cell phones are powerful devices unlike anything else police may find on someone they arrest. In writing the opinion for the court, Chief Justice John Roberts cited a 1926 case for perspective:

*"In 1926, Learned Hand observed (in an opinion later quoted in Chimel) that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." United States v. Kirschenblatt, 16 F. 2d 202, 203 (CA2). If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—"*ⁱⁱ

Justice Roberts concluded with:

*"With all they contain and all they may reveal, they hold for many Americans "the privacies of life," Boyd, supra, at 630. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple— get a warrant."*ⁱⁱⁱ

What effect, if any, does that holding have with respect to searches of cell phones in public schools? As we know, searches in public schools, by school officials, can be conducted when there are reasonable grounds (not probable cause) to believe the search will produce an illegal item, contraband, or an item that is in violation of school policy or rule.^{iv} Do teachers and school administrators have the authority to search and inspect the contents of cell phones when they find them on students? There is no question that young people adapt to new technology faster than the rest of us. And no one can argue that they don't have an expected right of privacy in the cell phone they take to school. Just try to pick one up from them as see how fast they move to get it back.

When the courts set standards for searches at school they try to balance several things. First and foremost they must safeguard the safety of the students. Attending school is mandatory. And since attending school is mandatory, the courts (at least at this point in time) have refused to simply allow random searches of all students as a policy.^v The courts recognize that the schools have a great responsibility to keep their students safe. Second, because school is mandatory, students cannot refuse a school search by simply not attending. As a result, courts have held that students are entitled to some privacy protections while in school. Students do not leave their constitutional rights at the schoolhouse door.^{vi} And third, courts try to assist teachers and administrator in controlling their schools by establishing reasonable standards of enforcement rather than by requiring technical or legal standards in protecting and safeguarding their students.

Now, make no mistake, changes in education law continue to give school officials broad authority to implement policies that are designed to keep campuses safe.^{vii} School officials have been able to justify the less than probable cause standard for searches at school because searches at schools are categorized as "special need."^{viii} For a student, "special needs" (or the less than probable cause standard) can also occur to a schools' random drug testing of student athletes,^{ix} or the drug testing of students participating in extracurricular activities.^x What has been required in these "special needs" cases is a fact-specific balancing of the intrusion against the promotion of legitimate governmental interests.

The search of the contents of a cell phone would be no different. The test of reasonableness under all the circumstances, as used in schools, requires a balancing of the need for the particular search against the invasion of the personal rights

that the search entails.^{xi} A search of a student by a school official must be reasonably related to the objectives of the search and may not be excessively intrusive in light of the age and sex of the student and the nature of the infraction.^{xii} The school administrator must weigh the extent of the intrusion, against the reasonableness of the information received, against the need for the school to go forward with a search. Clearly, if a school policy prohibits the possession of a phone and a school administrator receives information regarding its possession, a search “for” the phone would be warranted. However, that information alone, without more, may not be enough to authorize a search of the “contents” of that seized phone. And a subsequent search of that phone, without more, would be unreasonable.

School policies addressing the possession of a phone by a student during school hours are changing rapidly. These devices are no longer used just for phone calls and texting. As discussed in **Riley**, cell phones contain personal photographs, music, movies, books, emails, as well as, previous web searches. They can also access finances, bank accounts, and tax records. Many smartphones include high-resolution touchscreens and web browsers that display standard web pages as well as mobile-optimized sites. High-speed data access may be provided by Wi-Fi and mobile broadband. These devices may also be used as portable media players, digital cameras, and GPS navigation units. As a result, some schools and teachers have recognize these phones as tools to better learning. Smartphones have become tools for research and studying. The rapid development of the mobile app market has made the smartphone an educational asset. Where phones were once banned, they are now encouraged. They have moved from a distraction to a learning tool in the classroom and in many cases a child without one is at a distinct disadvantage. As a result, simply possessing a phone at school may not be a violation of a school rule and not be subject to seizure, in and of itself.

A two part analysis should be conducted when addressing the issue of a search of the contents of a smartphone at school. The first is to make sure that the phone has been properly recovered by the school. Where the school has reasonable grounds to believe that a child is in violation of a school policy by possessing the phone, confiscation of the phone would be proper. The second is, once the school has valid possession of the phone, that reasonable grounds exist to search the “contents” of that phone. The search of the contents would be permissible if the school official had reasonable grounds to believe that the cell phone contained information that the student is or was engaged in conduct that violated the law or rules of the school.^{xiii}

In **State of Texas v. Granville**, out of the Amarillo Court of Appeals, a warrantless search of the stored data in a smartphone was considered unreasonable. Granville had been arrested at his high school for a misdemeanor and booked into the county jail. All of his belongings, including his smartphone, were taken from him and placed in the jail's property room while he was locked up. Three hours after his arrest, a different officer than the one who arrested Granville at the high school went into the property room and, without a search warrant, looked through Granville's phone in search of evidence connected to another, unrelated felony.^{xiv}

The search was considered unreasonable because, while there was probable cause to believe that evidence of a criminal offense may have been on the phone, the officer could have secured a warrant.

As had the Supreme Court in **Riley**, the Amarillo Court of Appeals likened a person's expected right of privacy in the contents of their cell phone to the expected right of privacy one would have in their home, stating:

...The power button can be likened to the front door of a house. When on, the door is open and some things become readily visible. When off, the door is closed, thereby preventing others from seeing anything inside. And though some cell phones may require the input of a password before it can be used, no evidence suggests that Granville's was of that type. So, the officer's ability to venture into the phone's informational recesses by merely pressing the power button does not suggest that Granville's interest in assuring the privacy of his information was minimal. Whether the phone was locked or not via a password, a closed door is sufficient to illustrate an expectation of privacy.^{xv}

The task now is to interpret these cases with respect to searches not by a law enforcement officer, but by a school official in a school setting. The standard of reasonableness under all the circumstances must apply to any search at school by a school administrator.^{xvi} This same standard must be applied, as well, to a search of the contents of a cell phone seized at school by a school administrator. The administrator would balance the strength or weakness of the information received against the infraction by the student and the school's need to discover the contents of the student's phone at that point in time. The added factor to the administrator is in recognizing the Supreme Court's emphasis on a person's expected right of privacy in the contents of their cell phone.

Information received by a school administrator that a student may be in possession of a cell phone in violation of school rules may warrant recovery of that phone. However, any search of the contents of that phone would require its own reasonable grounds that the contents contain improper or illegal information. That search (contents) would be limited based on the information received and utilizing the reasonable standard for school searches. As an example, if a school administrator received information that a student was improperly texting during school, and the administrator felt the

information was reasonably reliable; the school administrator would be permitted to search the content of the student's phone for text messages and there times. However, the administrator would not be allowed to scroll through other parts of the student's phone, such as pictures or emails. Under that same example, what if when asked about improperly texting, the student admitted that he was improperly texting? Would his admission eliminate the need for a search of the contents of his phone? If whether or not the student was improperly texting is not an issue, is a search for text messages in his phone necessary or "reasonable?" Although a person may have a reasonable and legitimate expectation of privacy in the contents of his cell phone, it is possible to lose that expectation under some circumstances, such as if he abandons his cell phone, lends it to others to use, or gives his consent to its search.^{xvii}

If a school official, however, obtains information to believe that a student's phone contains information or evidence of a student's illegal activity it may be a good practice to turn the phone and the child over to a law enforcement officer for a full probable cause determination. If appropriate, an arrest and procurement of a search warrant could be obtained by the officer. If the administrator or the law enforcement officer felt exigent circumstances, or that an immediate danger existed, a search of the contents would certainly be permissible.^{xviii}

The development of new technologies is a continuing process. As are policies and procedures in schools regarding these new technologies. The "reasonableness under all the circumstances" standard for school searches continue to apply to searches in schools by school officials. While cell phones bring new technology to the schools, the same rules of school searches continue to give guidance to school administrators on what they can and cannot do when it comes to the searching of cell phones and their contents. Even with the holding in **Riley**, it is doubtful that a school administrator, who has reasonable grounds to believe that a student's cell phone contains information regarding a violation of a school rule, will need to procure a warrant.

ⁱ **Riley v. California**, No. 13–132, 573 U.S.____, Tex.Juv.Rep. Vol. 28 No. 3 ¶ 14-3-9 (6/25/2014). On Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One.

ⁱⁱ **Riley v. California**, Id. at Slip 21.

ⁱⁱⁱ **Riley v. California**, Id. at Slip 29.

^{iv} **New Jersey v. T.L.O.**, 469 U.S. 325 at 333, 105 S. Ct. 733; 83 L. Ed. 2d 720; 1985 U.S. LEXIS 41; 53 U.S.L.W. 4083 (1985).

^v **Anable v. Ford**, 653 F.Supp. 22, 663 F.Supp. 149 (W.D. Ark. 1985).

^{vi} **In re Gault**, 387 U.S. 1 (1967).

^{vii} **Board of Education v. Earls**, No. 01-332, Supreme Court Of The United States, 122 S. Ct. 2559; 153 L. Ed. 2d 735; 2002 U.S. LEXIS 4882; 70 U.S.L.W. 4737; (June, 2002).

^{viii} **Ferguson v. City of Charleston**, 532 U.S. 67, 79, 149 L. Ed. 2d 205, 121 S. Ct. 1281 (2001)

^{ix} **Vernonia School Dist. 47J v. Acton et ux.**, 515 U.S. 646, 651-53, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995).

^x **Board of Education v. Earls**, No. 01-332, Supreme Court Of The United States, 122 S. Ct. 2559; 153 L. Ed. 2d 735; 2002 U.S. LEXIS 4882; 70 U.S.L.W. 4737; (June, 2002).

^{xi} **S.C. v. State Of Connecticut**, No. 02-9274, 382 F.3d 225; 2004 U.S. App. LEXIS 18834 (2nd Cir. 2004).

^{xii} **New Jersey v. T.L.O.**, 469 U.S. 325 at 333, 105 S. Ct. 733; 83 L. Ed. 2d 720; 1985 U.S. LEXIS 41; 53 U.S.L.W. 4083 (1985).

^{xiii} **T.L.O.**, Id.

^{xiv} **State v. Granville**, No. 07-11-0415-CR, 373 S.W.3d 218 (Tex.App.—Amarillo, 7/11/12).

^{xv} **State v. Granville**, No. 07-11-0415-CR, 373 S.W.3d 218 (Tex.App.—Amarillo, 7/11/12).

^{xvi} **New Jersey v. T.L.O.**, 469 U.S. 325 at 333, 105 S. Ct. 733; 83 L. Ed. 2d 720; 1985 U.S. LEXIS 41; 53 U.S.L.W. 4083 (1985).

^{xvii} **State v. Granville**, No. 07-11-0415-CR, 373 S.W.3d 218 (Tex.App.—Amarillo, 7/11/12).

^{xviii} **Riley v. California**, No. 13–132, 573 U.S.____, Tex.Juv.Rep. Vol. 28 No. 3 ¶ 14-3-9 (6/25/2014). On Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One.

REVIEW OF RECENT CASES

COLLATERAL ATTACK

TEXAS COURT OF APPEALS LACKS ORIGINAL JURISDICTION TO ISSUE A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM HIS CONVICTION FOR AGGRAVATED ROBBERY BECAUSE IT IS NOT A CIVIL CASE.

¶ 14-3-4. *In re D.A.B.*, MEMORANDUM, No. 12—14—00147—CV, 2014 WL 2609722 (Tex.App.—Tyler, 6/11/14).

Facts: On July 15, 2008, D.A.B., a juvenile, was detained on a charge of aggravated robbery. He was subsequently prosecuted and convicted for the offense and sent to the Texas Youth Commission. Later, he was transferred to the Texas Department of Criminal Justice—Institutional Division, where he is presently incarcerated.

On February 7, 2013, D.A.B. filed a petition for writ of habeas corpus in the juvenile court alleging new evidence of actual innocence and prosecutorial misconduct. The juvenile court conducted an evidentiary hearing, and eleven months later, forwarded findings of fact and conclusions of law to the Texas Court of Criminal Appeals. That court dismissed the writ for want of jurisdiction. The juvenile court then directed the Angelina County District Clerk to forward the court's findings of fact and conclusions of law, along with the reporter's record of the evidentiary hearing, to the Texas Supreme Court. According to D.A.B., that court is "holding the Writ filed [on] April 12, 2014]" pending this court's disposition in the instant proceeding.

Held: Dismissed for want of jurisdiction

Memorandum Opinion: A person confined pursuant to an adjudication and disposition in juvenile court is entitled to seek habeas corpus relief in the appropriate court. See TEX. FAM.CODE ANN. § 56.01(o) (West 2014). However, the circumstances under which this court has original habeas jurisdiction are narrow. Specifically, this court has original jurisdiction to issue a writ of habeas corpus only when it appears that a person is restrained in his liberty "by virtue of an order, process, or commitment issued by a court or judge because of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case." See TEX. GOV'T CODE ANN. § 22.221(d) (West 2004).

We do, however, have jurisdiction to review, by direct appeal, a trial court's denial of a juvenile's postconviction petition for writ of habeas corpus. See generally, e.g., *In re M.P.A.*, No. 03—08—00337—CV, 2010 WL 2789649 (Tex.App.—Austin July 14, 2010) (mem.op.), rev'd in part and remanded on other grounds, 364 S.W.3d 277 (Tex.2012); *In re J.W.A.*, No. 03—03—00464—CV, 2005 WL 2574024 (Tex.App.—Austin Oct. 13, 2005, no pet.). D.A.B. did not file a notice of appeal in this case. Moreover, D.A.B.'s habeas petition does not meet the requirements for a notice of appeal. See TEX.R.APP. P. 25.1. But even if we could construe the petition as a notice of appeal, we cannot determine from the documents provided that an appealable order, such as an order denying habeas relief, has been signed. See TEX.R.APP. P. 25.1(d)(2) (requiring that notice of appeal state date of judgment or order appealed from).

Conclusion: This court lacks original jurisdiction to issue a writ of habeas corpus under the facts presented here. Moreover, D.A.B.'s habeas petition cannot be construed as a notice of appeal. Accordingly, we dismiss D.A.B.'s petition for writ of habeas corpus. See TEX. GOV'T CODE ANN. § 22.221(d).

DISPOSITION PROCEEDINGS

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY MODIFYING JUVENILE'S DISPOSITION FROM PROBATION TO CONFINEMENT IN A TJJD FACILITY WHERE EVIDENCE WAS SUFFICIENT FOR COMMITMENT PRIOR TO DELAY IN DISPOSITION.

¶ 14-3-10. *In the Matter of C.A.G.*, MEMORANDUM, No. 04-13-00686—CV, Tex.App.—San Antonio, 7/9/14).

Facts: In February 2013, appellant pled true to assault causing bodily injury to a peace officer; was placed in the care, custody, and control of the Chief Probation Officer; and committed to the Cyndi Taylor Krier Juvenile Correctional Treatment Center (the "Krier Center"). Among the rules of his probation was that he obey all rules of placement. About five months after his placement, appellant was discharged, unsuccessfully, for not completing the program at the Krier Center. The State subsequently filed a motion to modify disposition.

At appellant's first modification hearing, on July 25, 2013, he pled true to failing to obey the rules of the placement for which he was unsuccessfully discharged from the Krier Center based on "continued behavioral misconduct and non-compliance." At this hearing, Jeff Garza, appellant's probation officer, testified that appellant (who was seventeen years old at the time of

the hearing) had “an extensive history [beginning at age twelve] with” the probation department, and appellant had a total of seventeen referrals to the department. Garza said appellant was on two separate probation terms, one for assault bodily injury that was adjudicated in June 2011; and due to subsequent violations, appellant was ordered into secure placement at the Krier Center on July 12, 2012. While at the Krier Center, appellant committed the felony offense of assault on a public servant, for which he was adjudicated; was placed on probation until his eighteenth birthday; and his placement at the Krier Center was continued.

Garza testified appellant was unsuccessfully discharged from the Krier Center on June 5, 2013, and the discharge was a culmination of behavior sanctions that occurred over his eleven-month placement. Garza said appellant amassed over 270 behavior sanctions during his placement, the majority of which were related to fighting with peers, gang-related behavior, and verbal aggression. Prior to his June discharge, a special staffing occurred on March 6, 2013, at which it was decided to alter appellant's treatment plan. Garza said appellant did not take advantage of the opportunity the treatment team put in place for him. A second special staffing occurred on May 10, 2013, this time with appellant's mother present, following which appellant was given thirty days in which to improve his behavior. However, by June 5, 2013, appellant again threatened the staff and had “well over 200 refusals for BTOs and the BCUs.” Appellant was released from the Krier Center on July 11, 2013, and placed on electronic monitoring while he was in his mother's home. Garza said a recent evaluation of appellant revealed his level of risk to re-offend is high; his risk factors include aggression; and a mental health history that includes anxiety, depression, ADHD, conduct disorder, and cannabis dependence.

Appellant's mother testified that appellant has been well-behaved since returning home from the Krier Center.

At the close of the July 25 hearing, the trial court continued appellant on electronic monitoring until August 15, 2013, imposed a curfew, and withheld disposition until September 10, 2013. The court noted it would “let [appellant's] actions tell me what I'm going to do.” The court told appellant, “You mess up, you're going to TJJD.” Appellant responded, “Yes, ma'am.” In the less than two months between the July 25 hearing and the September 10 hearing, appellant left the county without permission from the probation department, failed to comply with curfew, and tested positive for marijuana use.

At the September 10 hearing, Garza said appellant did well while he was on electronic monitoring, he reported weekly, and his drug tests were clean. However, on August 15, the monitor was removed, and

on August 17, appellant left the county without permission. Appellant reported back to Garza on August 28, and his drug test showed positive for marijuana. Garza reminded the court that appellant's unsuccessful discharge from the Krier Center was based on over 270 documented behavior infractions over an eleven-month period. Appellant's mother said she did not know appellant was not allowed to leave the county without permission. Appellant admitted he “messed up,” but he has been trying to do what he is required of him. Following the September 10 hearing, the trial court committed appellant to the TJJD and this appeal followed.

Held: Affirmed

Memorandum Opinion: On appeal, appellant concedes he “faces many problems,” but he contends he was compliant with his counseling sessions while at the Krier Center and individual counseling appeared to help him. He asserts it is in his best interest to keep him near his family, in residential placement or on probation. We review the court's disposition order and findings under an abuse of discretion standard separate and apart from legal and factual sufficiency standards. *In re K.T.*, 107 S.W.3d 65, 74–75 (Tex.App.-San Antonio 2003, no pet.). We view the evidence in the light most favorable to the court's ruling, affording almost total deference to its findings of historical fact supported by the record, but review *de novo* the court's determination of the applicable law, its application of the law to the facts, and its resolution of any factual issues that do not involve credibility assessments. *Id.* at 75.

Section 54.05 of the Texas Family Code controls what the trial court must find before a modification committing the child to the TJJD is authorized. TEX. FAM.CODE ANN. § 54.05 (West 2014). A disposition based on a finding that the child engaged in delinquent conduct may be modified to commit the child to the TJJD if the court, after a hearing to modify disposition, finds by a preponderance of the evidence that the child violated a reasonable and lawful order of the court. *Id.* § 54.05(f). The court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of other witnesses. *Id.* § 54.05(e).

Courts are vested with a great amount of discretion in determining the suitable disposition of children found to have engaged in delinquent conduct, and this is especially so on hearings to modify disposition. In the Matter of J.L., 664 S.W.2d 119, 120 (Tex.App.-Corpus Christi 1983, no writ). Therefore, the controlling issue when a court modifies a disposition that was based on a finding of delinquent conduct is whether the record shows that the court abused its discretion in finding, by a preponderance of the evidence, a violation of a condition of probation. See In the Matter of P.A.O., 530 S.W.2d 902, 904

(Tex.Civ.App.-Houston [1st Dist.] 1975, no writ); In the Matter of Cockrell, 493 S.W.2d 620, 626 (Tex.Civ.App.-Amarillo 1973, writ ref'd n.r.e.).

Appellant pled true to violating a condition of his probation. A plea of true to a violation of probation is analogous to a judicial confession that justifies the court's finding the violation was committed by a preponderance of the evidence. See *In re J.P.*, 150 S.W.3d 189, 190–91 (Tex.App.-Fort Worth 2003), *aff'd*, 136 S.W.3d 629 (Tex.2004); *In re M.A.L.*, 995 S.W.2d 322, 324 (Tex.App.-Waco 1999, no pet.); In the Matter of J.L., 664 S.W.2d at 120–21. Therefore, based on appellant's plea of true, the trial court found, by a preponderance of the evidence, that appellant had violated one condition of his probation. Also, between the July hearing and the September hearing, the trial court afforded appellant the opportunity to avoid commitment to the TJJD, and expressly told appellant at the end of the July hearing, “You mess up, you're going to TJJD.” Within days of being released from electronic monitoring, appellant left the county without consent, and, upon his return, tested positive for marijuana use.

Conclusion: On this record, we cannot conclude the trial court abused its discretion by modifying the disposition from probation to confinement in a TJJD facility. We overrule appellant's issue on appeal and affirm the trial court's order.

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN TRANSFERRING JUVENILE TO TDCJ AS OPPOSED TO RELEASING HIM ON PAROLE BECAUSE THERE WAS SOME EVIDENCE TO SUPPORT THE COURT'S DECISION.

¶ 14-3-3. **In the Matter of J.D.H.M.**, MEMORANDUM, No. 04—13—00235—CV, 2014 WL 1089748 (Tex.App.—San Antonio, 3/19/14).

Facts: According to documents in the record, J.D.H.M. received a call from a female individual asking him if he wanted some marijuana. The female claimed she knew a drug dealer they could rob. The female individual and a male individual picked up J.D.H.M., who claimed to be using Xanax and marijuana that day. The male individual had a gun. When the three arrived at the drug dealer's house, only J.D.H.M. went inside—he took the gun with him. Once inside, J.D.H.M. pointed the gun at the individuals in the house and demanded marijuana, a scale, and the television. One of the individuals in the home carried the television outside and loaded it into the waiting car. J.D.H.M. and the others left.

Ultimately, J.D.H.M. was arrested. The State filed a petition alleging J.D.H.M. engaged in delinquent conduct in that he committed an aggravated robbery.

J.D.H.M. stipulated to the charge and pursuant to a plea bargain agreement with the State, the juvenile court committed J.D.H.M. to TJJD for a fifteen-year determinate sentence, with the possibility of transfer to TDCJ.

After J.D.H.M. spent approximately two years in the TJJD, the Executive Director of the TJJD advised the juvenile court that the agency was requesting J.D.H.M. be transferred to TDCJ because he would not have completed his minimum required stay at TJJD before his nineteenth birthday. After a hearing, the juvenile court ordered J.D.H.M. transferred to TDCJ to complete his sentence. J.D.H.M. perfected this appeal.

J.D.H.M. contends that the trial court abused its discretion in transferring him to TDCJ rather than placing him on parole.

Held: Affirmed

Memorandum Opinion: In determining whether a juvenile should be transferred, the juvenile court may consider several factors, including:

- the experiences and character of the juvenile before and after commitment to TJJD;
 - the nature of the offense the juvenile committed and the manner in which it was committed;
 - the abilities of the juvenile to contribute to society;
 - the protection of the victim of the offense or any member of the victim's family;
 - the recommendations of the TJJD and the prosecutor;
 - the best interests of the juvenile; and
 - any other factor relevant to the issue to be decided.
- TEX. FAM.CODE ANN. § 54.11(k).

Although the court may consider these factors, it is not required to consider each one, and is expressly permitted to consider relevant factors not set forth in section 54.11(k). J.J., 276 S.W.3d at 178; see TEX. FAM.CODE ANN. § 54.11(k).

The record establishes the juvenile court looked at the evidence in light of the relevant section 54.11(k) factors. The court noted “the good things” J.D.H.M. accomplished, but recalled that at the time of sentencing, she warns those like J.D.H.M. with determinate sentences about their behavior and its possible ramifications with regard to subsequent transfers to TDCJ. The juvenile court stated it was possible J.D.H.M.'s behavior had changed simply because he realized he was turning nineteen and he would have to come back to court with regard to a transfer to TDCJ.

Considering J.D.H.M.'s offense—aggravated robbery—and his extensive behavioral issues during his time in TJJD, coupled with the recommendations from Mr. Cucolo and TJJD, we cannot say the juvenile court abused its discretion in ordering J.D.H.M. transferred to

TDCJ. Mr. Cucolo presented evidence that J.D.H.M. was not a good candidate for even structured parole based on his behavioral problems while at TJJD, his drug and alcohol issues, and the fact that he had not yet fulfilled the minimum three years of his sentence. Although Dr. Covarrubias thought that it was in J.D.H.M.'s best interest to be released into a structured parole environment based on his recent behavioral improvements, mental stability, and academic success, the court did not find his opinion compelling, perhaps because J.D.H.M.'s recent improvement was at a time when he knew transfer was possible.

Clearly, there was some evidence to support the juvenile court's decision to transfer J.D.H.M. to TDCJ as opposed to releasing him on parole. Because there was some evidence to support the court's decision, we hold there was no abuse of discretion. See L.G.G., 398 S.W.3d at 855; D.L., 198 S.W.3d at 229.

Conclusion: Based on the foregoing, we overrule J.D.H.M.'s point of error and affirm the trial court's judgment.

**NO ABUSE OF DISCRETION WHERE TRIAL COURT
DELAYED DISPOSITION FOR A THIRTY-DAY TRIAL
PERIOD AT HOME BEFORE DECIDING PLACEMENT WAS
IN THE BEST INTEREST OF THE CHILD.**

¶ 14-3-1. **In the Matter of J.M.**, No. 05-14-00055-CV, 2014 WL 2134539 (Tex.App.—Dallas, 5/22/14).

Facts: J.M. was sixteen years old when she entered the juvenile justice system. Her mother called police after J.M. threatened her older brother with a knife and said she wanted to kill him. She was initially charged with aggravated assault; that charge was reduced to a misdemeanor charge of making a terroristic threat. J.M. entered a plea of true, and the trial court found her to be a child engaged in delinquent activity.

At the disposition hearing, the State offered J.M.'s psychological evaluations and predisposition reports. In those reports J.M. conceded that she had not been enrolled in school for some time, and testing revealed her to function at below-average levels in all subjects. J.M. reported that her mother took her out of high school after the ninth grade because J.M. was being "continually harassed by her peers." J.M. told the interviewer that she did not even attempt to interact with her classmates. She related an incident that occurred when she was fifteen, when—frustrated with what she saw as parental misunderstanding—she "stood in the middle of the street waiting to be struck by a car." Her father found her and brought her home; she said she had not felt suicidal since then. The reports described J.M.'s history of aggressive behavior, including starting a fire in an ant hill. J.M. also related that she routinely suffered from both auditory hallucinations and visual hallucinations including

auditory hallucinations during one of her psychological interviews. She spoke of experiencing mood swings, and she exhibited signs of depression. She admitted she tortures the family dog. The reports indicate her mother and brother are both diagnosed with schizophrenia and bipolar disorder and that J.M. was diagnosed as having "Psychosis and Major Depressive Disorder with psychotic features," for which "[s]hort-term placement was recommended."

Maury Sauls, the court judicial liaison, testified at the disposition hearing on behalf of J.M.'s assigned probation officer. Based on the reports in evidence, Sauls testified J.M. was in need of rehabilitation and that the protection of the public as well as J.M. required that disposition be made. He relayed the recommendation of the juvenile department: that J.M. be placed on probation for a period of one year, in the custody of the chief probation officer for placement at the New Life Center. He agreed that probation in her home was "not an option" because J.M. needed residential treatment, with constant supervision and a therapist at hand.

J.M., in turn, offered the report from her Initial Psychiatric Consultation with Doctor Ayo Afejuku. The doctor concluded J.M. did not require medication at that time because her mental status and functioning were stable. However, Afejuku's "Diagnostic Impressions" indicated J.M. displayed Anxiety Disorder, Social Anxiety Disorder, Psychosis, Major Depressive Disorder with psychotic features, and Conduct Disorder. Afejuku recommended "consistent treatment providers" as well as individual therapy.

The evidence was consistent in recommending a structured environment and therapy for J.M. Where the placement issue was raised, the reports recommended J.M. be placed away from her parents' home. Nevertheless, rather than make a disposition immediately, the trial court suspended J.M.'s hearing, allowing her to return home for a thirty-day trial period.

When the disposition hearing resumed, the State offered J.M.'s updated predisposition reports. These reports indicated J.M. had been participating in the Youth Advocate Program, and her advocate mentor was pleased with J.M.'s compliance with the program. However, the reports also indicated that J.M. had failed to abide by her curfew consistently and that her parents were not cooperating with services related to family therapy sessions provided by J.M.'s mentor. The reports also noted J.M. had failed to attend school every day, although the primary attendance issue appears to have been related to violation of school rules concerning hair styles. Finally, the report states that J.M.'s mother failed to take J.M. to Dallas Metro Care for completion of a recommended mental health evaluation. (J.M. actually missed a day of school when

she unsuccessfully attempted to attend the appointment without her mother.)

The State also called J.M.'s probation officer, Billy Middleton to testify. He discussed all the observations made in the predisposition reports, and he testified to the department's recommendations for J.M. as follows:

The Juvenile Department finds that reasonable efforts have been made to maintain the subject at home; however, the subject's rehabilitation needs are greater than what can be provided in the home.

The subject warrants placement in New Life Program where her level of care will be specialized in the needs of individual and group therapy, as well as sufficient consequences for aggressive behavior will be addressed in a well-structured and supervised environment. Her family should be involved in all relevant interventions.

It is respectfully recommended the subject be assigned to Progressive Sanction Level 4 and placed on probation for a period of one year in the custody of the Chief Probation Officer for placement at New Life.

Middleton testified that J.M.'s academic needs could be met with this placement and that both group and individual therapy would be available to her. He stated that all reasonable efforts had been made to keep her in her parents' home and that reasonable efforts would be made to return her home as soon as possible. However, it was his opinion that she could not be given the quality of care and level of support she needed at home at that time.

J.M. called her parents to testify. Her mother testified that she had seen improvement in J.M.'s behavior and that J.M. was complying with her curfew with only five-to-ten minute violations. Her father also testified that he saw improvement in J.M.'s behavior. He stated he would supervise J.M. and would be sure she got to school and to medical appointments. Both parents asked the court to allow J.M. to stay at home with them.

The trial court concluded remaining in her parents' home was not in J.M.'s best interest. The court found she was in need of rehabilitation and that her protection—and the protection of the public—required her to be placed on a one-year probation, in the custody of the chief probation officer, for placement at New Life Center. J.M. appeals her placement and seeks to be allowed to return to her parents' home.

Held: Affirmed

Opinion: The single question before us is whether the trial court abused its discretion by placing J.M. away from her parents' home. Before the trial court can place a child on probation outside the child's home, the

court must find: it is in the child's best interests to be so placed; reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to her home; and the child, in her home, cannot be provided the quality of care and level of support and supervision that she needs to meet the conditions of probation. TEX. FAM.CODE ANN. § 54.04(i)(1) (West 2014). We review a trial court's disposition of a child found to be engaging in delinquent behavior for an abuse of discretion. In the Matter of K.E., 316 S.W.3d 776, 781 (Tex.App.-Dallas 2010, no pet.) ("A juvenile court has broad discretion in determining the appropriate placement for a juvenile who has been adjudicated as engaging in delinquent behavior."); In the Matter of J.M., 25 S.W.3d 364, 367 (Tex.App.-Fort Worth 2000, no pet.). The test for abuse of discretion is whether the trial court acted in an unreasonable or arbitrary manner, without reference to guiding rules and principles. K.E., 316 S.W.3d at 781.

In this case, the court gave J.M. a thirty-day trial period at home to determine whether that environment would allow her to receive the care she needed. There were no reports she exhibited any extreme or violent behavior during the trial period. However, there was evidence—in the form of missed curfews—that J.M.'s home environment was not sufficiently structured and supervised. There was also evidence that J.M. missed an appointment for a psychological evaluation during this trial period, and evidence her parents were not cooperating sufficiently with respect to J.M.'s treatment.¹

J.M.'s probation officer testified that J.M. needed to have a highly structured environment with consistent supervision and a therapist always present. He testified she was not able to receive the care and supervision she needed in her home.

The trial court found it was in J.M.'s best interests to be placed at the New Life Center where her educational and mental health needs could be met. The trial court further found that reasonable efforts had been made to prevent the need for J.M.'s removal from her home and to make it possible for her to return to her home as soon as possible. In the end, the court found that—if J.M. remained at home—she could not be provided the quality of care and level of support and supervision that she needed to meet the conditions of probation. See TEX. FAM.CODE ANN. § 54.04(c), (i)(1). Based on those findings, the trial court signed its judgment placing J.M. on probation for one year with placement at the New Life Center.

We conclude the trial court's ruling is reasonable in light of the evidence and was made in reference to the requirements of the statute. We discern no abuse of discretion in J.M.'s placement. See K.E., 316 S.W.3d at 781. We overrule her single issue.

Conclusion: We affirm the trial court's judgment.

A JUVENILE WHOSE "LIFE WITHOUT PAROLE" SENTENCE HAS BEEN MODIFIED TO "LIFE," IS NOT ENTITLED TO AN INDIVIDUALIZED PUNISHMENT HEARING BEFORE THE NEW SENTENCE CAN BE ASSESSED.

¶ 14-3-2. **Lewis v. Nolley**, No. PD—0833-13, PD—0999-13, 428 S.W.3d 860 (Tex.Crim.App., 4/30/14).

Facts: On or about August 28, 2008, Appellant Lewis killed Jaime Lujan while in the course of committing or attempting to commit retaliation against Lujan's coworker, who had provided police with information that led to the arrest of Lewis's friend. Appellant Lewis was born on August 29, 1991, meaning that he was sixteen on the date of the offense. He was originally detained as a juvenile but was later certified to be tried as an adult. See TEX. FAM.CODE ANN. § 54.02. He was eventually convicted of capital murder and assessed a mandatory sentence of life imprisonment without the possibility of parole as required by the then-current version of Section 12.31 of the Penal Code. TEX. PENAL CODE ANN. § 12.31(a) (2008) ("An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the institutional division for life without parole."). He was not afforded the opportunity to present mitigating evidence at a punishment hearing because life imprisonment without parole was automatic under the statutory scheme. Lewis filed a timely appeal, and the appellate court affirmed his conviction. *Lewis v. State*, No. 07-11-0444-CR (Tex.App.-Amarillo Apr. 17, 2013), withdrawn by *Lewis v. State*, 402 S.W.3d 852 (Tex.App.-Amarillo 2013). In 2013, after the Supreme Court announced its decision in *Miller*, he filed a supplemental brief contending that his life-without-parole sentence was unconstitutional in light of *Miller v. Alabama*, 567 U.S. —, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (holding mandatory life without parole cruel and unusual punishment when imposed on juvenile offenders). The appellate court reaffirmed appellant Lewis's conviction but reformed his sentence to life imprisonment. *Lewis v. State*, 402 S.W.3d 852, 867 (Tex.App.-Amarillo 2013).

Appellant Nolley was also sixteen years old when he shot and killed Larry Ayala during a robbery and home invasion on July 27, 2010. His case was also transferred from the juvenile district court to the criminal district court. See TEX. FAM.CODE ANN. § 54.02. On April 19, 2012, a jury convicted appellant Nolley of capital murder. Without a hearing at which to present mitigating evidence, appellant Nolley was sentenced to life imprisonment without the possibility of parole. On appeal, he challenged the legality of his sentence under the 2009 version of Section 12.31(a) of the Texas Penal Code and *Miller v. Alabama*. The

appellate court reformed appellant Nolley's sentence to life imprisonment to comport with Section 12.31(a) of the Penal Code and Supreme Court precedent but affirmed the trial court's judgment in all other respects. *Nolley v. State*, No. 14-12-00394-CR, 2013 WL 3326796, at *5 (Tex.App.-Houston [14th Dist.] Jun. 27, 2013) (mem. op., not designated for publication).

Both appellants filed petitions for discretionary review, claiming that their reformed sentences are unconstitutional because *Miller* requires individualized sentencing of juvenile offenders. Appellant Nolley contends, more specifically, that *Miller* mandates individualized sentencing when juveniles in Texas face life imprisonment because it is the most severe punishment for which juveniles are eligible in this state.

Held: Affirmed

Opinion: Appellants argue that they are entitled to individualized sentencing hearings before being assessed sentences of life imprisonment because they were juveniles at the time of their offenses. This is not what *Miller* requires. *Miller* does not entitle all juvenile offenders to individualized sentencing. It requires an individualized hearing only when a juvenile can be sentenced to life without the possibility of parole. After the reformations by the appellate courts, appellants are not sentenced to life without parole, and under Section 12.31 of the Penal Code, juvenile offenders in Texas do not now face life without parole at all. Therefore, appellants' cases do not fall within the scope of the narrow holding in *Miller*.

Appellant Nolley argues that, because Section 12.31 makes life imprisonment the most severe penalty available to juveniles in the state of Texas, he is entitled to an individualized hearing before he can be assessed that sentence. He cites the Supreme Court's language that "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles," *Miller*, 132 S.Ct. at 2475, for the proposition that courts should read *Miller* to apply to their jurisdiction's strictest penalty. Appellant's reliance is misplaced. The sentence immediately following that one reiterates that mandatory life imprisonment without the possibility of parole for juvenile offenders violates the principle of proportionality and, accordingly, the Eighth Amendment's ban on cruel and unusual punishment. In light of the simultaneous references to *Graham* and *Roper*, the United States Supreme Court's choice of "the harshest possible punishment," rather than "a state's harshest punishment," indicates that it was referring to sentencing a juvenile to life without parole. Finally, and most devastating to appellant's cause, is another sentence from the *Miller* opinion: "We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth

Amendment's prohibition on 'cruel and unusual punishments.' " Miller, 132 S.Ct. at 2460. Appellant's suggested interpretation is broader than the Supreme Court's choice of language supports.

Conclusion: Because the holding in Miller is limited to a prohibition on mandatory life without parole for juvenile offenders, appellants are not entitled to punishment hearings. We therefore affirm the judgment of the appellate courts.

EVIDENCE

IN A JUVENILE CASE, THE TEXAS PENAL CODE DOES NOT REQUIRE THE VICTIM OF AN AGGRAVATED ROBBERY BY THREAT TO PERCEIVE THE THREAT, ONLY THAT THERE WAS EVIDENCE OF A THREAT.

¶ 14-3-7. **In the Matter of A.J.R.P.**, No. 04-13-00734-CV, ___S.W.3d.___, (Tex.App.–San Antonio, 7/16/14).

Facts: T.S., a high school student, was the victim of the aggravated robbery. He testified before a jury that, on the day of the robbery, he rode the school bus home. When he got off the bus in his neighborhood, he was listening to very loud music through headphones that were attached to his iPhone. According to T.S., he saw something unusual out of the corner of his eye. A.J.R.P. was following him, running and ducking behind a truck that was on the same side of the street that T.S. was walking on. Because this was not A.J.R.P.'s usual bus stop, T.S. thought A.J.R.P. was running toward somebody else. T.S. got out his keys, and a couple of seconds after he saw A.J.R.P., he was hit on the back of his head. He blacked out and fell to the ground. T.S. testified that when he came to, he thought he was dead. His body was numb and he started yelling. He was in a lot of pain. A lady came from across the street to help him up. She called 911. T.S. noticed some scattered rocks on the ground. He then realized his phone was gone. When the police came, he was able to tell them that he thought A.J.R.P. had attacked him. A.J.R.P. was the only person on the street right before T.S. was attacked. At the time of the attack, T.S. was just two houses down from his own house. He testified that the pain in his head was the worst pain he had felt in his life. T.S. believed that A.J.R.P. used the rock to threaten him and to steal his iPhone. A couple of days later, he used a "find-a-phone" app and got a "ping" around the neighborhood where A.J.R.P. lives.

L.P., another student, testified that he exited the bus at the same time as T.S. and A.J.R.P. According to L.P., A.J.R.P. told him he wanted to get someone's iPhone. L.P. saw A.J.R.P. pick up a landscaping stone as he was walking behind T.S. At that point, L.P. turned around and went home. He heard a sound, but did not know what it was. He did not witness the robbery.

Several police officers responded to the scene of the robbery and testified at trial. Among those who testified was Officer Jonathan Kennedy of the Selma Police Department. Officer Kennedy testified that when he arrived at the scene, T.S. was injured and reported that someone had hit him. T.S. was treated by emergency technicians in an ambulance. Officer Kennedy and another officer found a broken rock and blood on the driveway where the robbery had occurred. Officer Donald Couser, also of the Selma Police Department, interviewed T.S. while he was being treated in the ambulance. He determined that T.S. had been assaulted by A.J.R.P. and that T.S.'s keys and cell phone had been stolen. Officer Keith Osborn, another Selma police officer, testified that on the evening of the robbery, he and another officer went to A.J.R.P.'s house and spoke with

A.J.R.P. and his mother. A.J.R.P. said that he and T.S. went to school together, rode the bus together, and were friends. A.J.R.P. said he had gotten off the school bus that day at his own bus stop and had not been in T.S.'s neighborhood that day. Officer Osborn, however, testified that he watched the bus video and it showed A.J.R.P. getting off the school bus at T.S.'s bus stop, not his own bus stop. The school bus driver, Daniel Jembarowski, confirmed that A.J.R.P. did not get off at his normal stop that day, which Jembarowski testified was unusual for him.

After hearing all the evidence, the jury found A.J.R.P. had engaged in delinquent conduct as charged by the State.

Held: Affirmed

Opinion: Although juvenile proceedings are civil matters, the standard applicable in criminal matters is used to assess the sufficiency of the evidence underlying a finding the juvenile engaged in delinquent conduct. In re R.R., 373 S.W.3d 730, 734 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); In re A.O., 342 S.W.3d 236, 239 (Tex. App.—Amarillo 2011, pet. denied). And, the Texas Court of Criminal Appeals has determined that the legal-sufficiency standard as enunciated in Jackson v. Virginia, 443 U.S. 307, 319 (1979), is the only standard that should apply in determining whether the evidence is sufficient to support each element that the State is required to prove beyond a reasonable doubt. See Brooks v. State, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). In a Jackson v. Virginia evidentiary-sufficiency review, we view all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson, 443 U.S. at 319; Adames v. State, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011), cert. denied, 132 S. Ct. 1763 (2012). The court of criminal appeals has explained that this standard "recognizes the trier of fact's role as the sole judge of

the weight and credibility of the evidence after drawing reasonable inferences from the evidence.” Adames, 353 S.W.3d at 860. Therefore, on appellate review, we determine whether based on “cumulative force of all the evidence” the necessary inferences made by the trier of fact are reasonable. *Id.* We conduct this constitutional review by measuring the evidentiary sufficiency with “explicit reference to the substantive elements of the criminal offense as defined by state law.” *Id.*

A.J.R.P. was charged with aggravated robbery under sections 29.02(a)(2) and 29.03(a)(2) of the Texas Penal Code. Section 29.02(a)(2) provides that a person commits robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. TEX. PENAL CODE ANN. § 29.02(a)(2) (West 2011). Section 29.03(a)(2) elevates the robbery to aggravated robbery if he uses or exhibits a deadly weapon. *Id.* § 29.03(a)(2).

A.J.R.P. contends that the evidence is legally insufficient to support the jury’s verdict because no rational trier of fact could have found that he threatened the victim or placed him in fear of imminent bodily injury. A.J.R.P.’s argument is specifically based on the fact that the evidence shows the attack was unexpected and, thus, T.S. did not perceive a threat. Further, A.J.R.P. points to the evidence showing T.S. was struck in the back of the head and did not witness anybody coming up behind him to hit him. A.J.R.P. also focuses on T.S.’s statement that he thought A.J.R.P. was running toward someone else. In other words, according to A.J.R.P., because the blow to T.S.’s head was a surprise, there is no evidence A.J.R.P. threatened T.S. or placed him in fear before striking him on the back of the head and taking his iPhone.

A.J.R.P. suggests that it might have been more appropriate for the State to allege that he committed aggravated robbery by assault, as set forth in sections 29.02(a)(1) of the Texas Penal Code. That section provides that an offense is committed if, in the course of committing theft, the actor intentionally, knowingly, or recklessly causes bodily injury to another. TEX. PENAL CODE ANN. § 29.02(a)(1) (West 2011). However, as A.J.R.P. points out, the sufficiency of the evidence must be measured against the statutory element that was actually pleaded—in this case, aggravated robbery by threat or by placing in fear. See *Cada v. State*, 334 S.W.3d 766, 773-74 (Tex. Crim. App. 2011) (explaining that because sufficiency of evidence is measured by hypothetical jury charge as “authorized by the indictment,” “if the State pleads one specific element from a penal offense that contains alternatives for that element, the sufficiency of the evidence is measured by the element that was actually pleaded, not any other statutory alternative element”).

The State counters that the evidence is legally sufficient to show A.J.R.P. committed aggravated robbery by threat or by placing in fear because, although T.S. did not state he was in fear before he was attacked, he did testify that (1) he was aware A.J.R.P. was behind him and (2) he believed A.J.R.P. threatened him with a rock.

Because of the sudden nature of the attack from behind, we agree with A.J.R.P. that the evidence is insufficient to show A.J.R.P. placed T.S. in fear of imminent bodily injury or death. See *Howard v. State*, 333 S.W.3d 137, 140 (Tex. Crim. App. 2011) (holding robbery by placing in fear requires that (1) the defendant is aware his conduct reasonably certain to place someone in fear and (2) someone actually is placed in fear). Whether there is sufficient evidence of robbery by threat, however, is not easily answered.

The Texas Court of Criminal Appeals has considered, in several cases, the issue of whether a threat must be perceived by the victim in order to satisfy the threat element of the various statutes that criminalize threatening conduct. In *McGowan v. State*, 664 S.W.2d 355, 357-58 (Tex. Crim. App. 1984), the court of criminal appeals found the evidence insufficient to sustain a conviction for aggravated assault by threat where there was no evidence of any threat being made against the victim. In *McGowan*, the evidence showed the victim was stabbed in the back of the head while trying to help her daughter who was being attacked by the defendant. *Id.* at 357. In its discussion of the evidence, the court stated it is undisputed that [the mother] did not know what appellant struck her with. [The mother] was merely trying to pull her daughter away from appellant. There is no evidence that prior to stabbing her appellant threatened her in any way. She never saw appellant holding a knife nor did she testify that appellant threatened her with a knife. Finally, the evidence shows that after appellant stabbed [the mother], he fled. Thus, we are constrained to hold that the evidence is insufficient [] to show aggravated assault by threats even though it shows bodily injury. *Id.* at 357-58.

One way to read the holding in *McGowan* is to conclude that, because the victim did not perceive a threat, there was insufficient evidence to sustain the conviction for aggravated assault by threat. However, a few years after *McGowan*, in *Olivas v. State*, 203 S.W.3d 341 (Tex. Crim. App. 2006), the court of criminal appeals clarified its holding in *McGowan* when it considered, again, the sufficiency of the evidence to sustain a conviction for assault by threat. The court discussed the definition of “threat.” Because the word is not statutorily defined in the Texas Penal Code, the court looked to the dictionary definition. *Olivas*, 203 S.W.3d at 345. It noted that Webster’s Dictionary defines “threaten” as:

1. to declare an intention of hurting or punishing; to make threat against;
2. to be a menacing indication of (something dangerous, evil, etc.); as the clouds threaten rain or a storm;
3. to express intention to inflict (injury, retaliation, etc.);
4. to be a source of danger, harm, etc. to. Olivas, 203 S.W.3d at 345 (emphasis in original).

The Olivas court noted that “each of these definitions indicates an act being performed, as opposed to an act which is perceived by an outside party.” Id. “Thus, these definitions indicate that a threat occurs, not when the victim perceived the threat, but as soon as the actor utters the threatening words or otherwise initiates the threatening conduct.” Id. Then, after noting that Black’s Law Dictionary defined “threat” as “[a] communicated intent to inflict harm or loss on another or on another’s property,” the court found the “assault-by-threat” statute to be ambiguous. Olivas, 203 S.W.3d at 345-46. The court then considered other statutes that criminalize threatening behavior. Id. at 346. In looking at the robbery-by-threat statute, the court noted that “[b]y defining robbery to be theft plus either threatening or placing another in fear, this statute demonstrates that the term ‘threaten’ means something other than placing a person ‘in fear of imminent bodily injury or death.’” Id. (emphasis in original). Then, in looking at the terroristic-threat statute, the court explained that “[l]ike robbery by threat, this statute indicates that ‘threaten’ and ‘place any person in fear of imminent serious bodily injury’ have two distinct meanings.” Id. According to the court, “[b]oth statutes imply that one can threaten without necessarily placing another in fear of imminent bodily injury.” Id. (emphasis in original). “A logical inference from this is that ‘threatening,’ as used in the Penal Code, does not require that the intended victim perceive or receive the threat, but ‘placing another in fear of imminent bodily injury’ does.” Id. (emphasis added).

The court then noted that some courts of appeals had too broadly construed McGowan “as holding that the Texas assault-by-threat and robbery-by-threat statutes require a victim to perceive a threat as it occurs—that is, the offense requires a successfully communicated threat.” Olivas, 203 S.W.3d at 347. In clarifying what it meant in McGowan, the court of criminal appeals stated that McGowan “did not define assault by threat as requiring a victim’s perception of the threat.” Olivas, 203 S.W.3d at 348. Rather, according to the court, “it was the lack of any evidence, not the mother’s lack of perception of a threat, that led this Court to conclude that the State failed to prove assault by threat.” Id. at 349 (emphasis in original). Further, the court of criminal appeals stated, “a more accurate description of the holding in McGowan is that there must be some evidence of a

threat being made to sustain a conviction of assault by threat.” Olivas, 203 S.W.3d at 349 (emphasis in original). The court then noted that McGowan did not address the question of whether assault by threat requires an intended victim to perceive the threat. Olivas, 203 S.W.3d at 349. “That question remains open.” Id. The court of criminal appeals then declined to resolve this open question because it found that there was sufficient evidence in that case that the victim had, in fact, perceived a threat. See id. at 349-51.

The concurring opinion in Olivas, authored by Presiding Judge Keller and joined by two others, agreed with the majority’s “conclusion that the assault statute does not require that the victim perceive the defendant’s conduct for that conduct to constitute a ‘threat.’” Id. at 351 (Keller, P.J., concurring) (emphasis added). However, the concurring opinion criticized the majority, noting “the Court gains nothing by stopping just short of making it a holding.” Id. According to the concurring opinion, “it would be better simply to hold, as the Court almost does, that a threat need not be perceived in order to be a threat.” Id. at 352.

Again, in Schmidt v. State, 232 S.W.3d 66, 67-68 (Tex. Crim. App. 2007), the court of criminal appeals considered the issue of whether a victim must perceive a threat and, once again, did not reach the issue left open by Olivas. As it had in Olivas, the court determined it need not decide the issues because there was ample evidence that the defendant communicated a threat to the victim. Id. at 68-69.

And, most recently, in Boston v. State, 410 S.W.3d 321, 322 (Tex. Crim. App. 2013), the court of criminal appeals again considered the issue of whether the victim of an aggravated robbery by threat must perceive a threat. In Boston, the court briefly reflected on its analysis and conclusion in Olivas that one could logically infer that the Texas Penal Code does not require the intended victim to perceive or receive the threat but, once again, declined to reach the issue, finding sufficient evidence that the victim perceived the defendant’s threatening behavior. Boston, 410 S.W.3d at 326-27. Thus, the court of criminal appeals again left the issue open.

Turning to the evidence in the case before us, because of the suddenness of the attack, T.S. did not perceive a threat from A.J.R.P before he was hit in the back of the head. Thus, we must answer the question that the Court of Criminal Appeals left open—whether the Texas Penal Code requires the victim of an aggravated robbery by threat to perceive the threat. We note that, although the court of criminal appeals has not directly and ultimately answered the question, the court has, in fact, given us some clear guidance. As noted above, the court concluded, and came just short of holding, that the victim does not have to perceive the threat. Olivas, 203 S.W.3d at 346. In light of this

guidance, we hold that the Texas Penal Code does not require the victim of an aggravated robbery by threat to perceive the threat. That being said, we must then consider whether, in this case, there was evidence of a threat that was not perceived by T.S.

The evidence shows A.J.R.P. followed T.S. as he got off the school bus. Although this was the proper bus stop for T.S., it was not A.J.R.P.'s usual bus stop. The evidence further shows A.J.R.P. expressed to another student, L.P., his intent to take someone's iPhone and that A.J.R.P. then picked up a landscaping stone as he was following T.S. toward T.S.'s home. Further, as A.J.R.P. followed T.S., he was running and ducking behind a truck on the same side of the street that T.S. was on. T.S. was then hit on the back of the head with the landscaping stone. We find this evidence sufficient for the jury to conclude that A.J.R.P.'s behavior toward T.S. was threatening, despite T.S.'s failure to perceive such behavior as threatening.

Conclusion: Accordingly, we hold the evidence is sufficient to support the finding that A.J.R.P. engaged in delinquent conduct. We thus affirm the trial court's judgment.

VIDEOTAPED STATEMENTS TO POLICE BY CO-DEFENDANTS, USED IN COURT AGAINST JUVENILE, WAS NOT CONSIDERED ACCOMPLICE-WITNESS TESTIMONY.

¶ 14-3-8. *In the Matter of V.G.V., Jr.*, MEMORANDUM, No. 03—13—00335—CV, 2014 WL 1362646 (Tex.App.—Austin, 4/1/14).

Facts: A jury found that V.G.V., Jr., appellant, engaged in delinquent conduct by committing the offenses of theft, criminal trespass, and burglary of a motor vehicle. The trial court adjudicated appellant delinquent based on the jury's findings and committed him to the Texas Youth Commission for an indeterminate period of time. In three issues, appellant contends his adjudications of delinquency were based on uncorroborated accomplice testimony and that the non-accomplice evidence is insufficient to connect him to the delinquent conduct. We will affirm.

The State alleged that on the night of December 5, 2012, appellant, a 16-year-old male, and two other men who were not juveniles committed theft of a firearm, criminally trespassed on two properties, and burglarized two motor vehicles. After a jury was empanelled, appellant pleaded "true" to both allegations of criminal trespass and "not true" to the remaining allegations. The two men who were alleged to have committed the offenses with appellant did not testify as witnesses at trial, but their videotaped statements to the police and a video of the two men taken during their detention in a patrol car were shown to the jury during trial. During their discussions in the

patrol car and in their statements made to the police, the two men implicated appellant in the criminal activities that occurred on the night of December 5, 2012.

In this appeal, appellant argues that the two other men were accomplices as a matter of law, attacks the legal sufficiency of the evidence to corroborate their testimony, and contends that the trial court erred by not granting his motion for directed verdict on the ground that the State failed to present sufficient evidence corroborating the alleged accomplice-witness testimony.

Held: Affirmed

Memorandum Opinion: Section 54.03(e) of the Texas Family Code requires corroboration of accomplice-witness testimony in juvenile delinquency proceedings: An adjudication of delinquent conduct or conduct indicating a need for supervision cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the child with the alleged delinquent conduct or conduct indicating a need for supervision; and the corroboration is not sufficient if it merely shows the commission of the alleged conduct. Tex. Fam.Code § 54.03(e). The accomplice-witness language in the Family Code is identical in substance to that of article 38.14 of the Texas Code of Criminal Procedure. See Tex.Code Crim. Proc. art. 38.14; *In the Matter of C.M.G.*, 905 S.W.2d 56, 58 (Tex. App.—Austin 1995, no writ).

The accomplice-witness rule reflects a legislative determination that accomplice testimony implicating another person should be viewed with caution because "accomplices often have incentives to lie, such as to avoid punishment or shift blame to another person." *Blake v. State*, 971 S.W.2d 451, 454 (Tex.Crim.App.1998). Under this rule, it is not necessary for the non-accomplice evidence to be sufficient in itself to establish the accused's guilt beyond a reasonable doubt. *Gill v. State*, 873 S.W.2d 45, 48 (Tex.Crim.App.1994). Nor is it required that the non-accomplice evidence directly link the accused to the crime. *Id.*; *Reed v. State*, 744 S.W.2d 112, 126 (Tex.Crim.App.1988). "All that is required is that there be some non-accomplice evidence which tends to connect the accused to the commission of the offense alleged in the indictment." *Gill*, 873 S.W.2d at 48 (emphasis in original). The phrase "tends to connect" has the ordinary dictionary definition, "to serve, contribute or conduce in some degree or way ... to have a more or less direct bearing or effect." *Holladay v. State*, 709 S.W.2d 194, 198 (Tex.Crim.App.1986) (quoting *Boone v. State*, 235 S.W. 580, 584 (Tex.Crim.App.1922)). There is no precise rule as to the amount of evidence that is required to corroborate the testimony of an accomplice; each case must be judged on its own facts. *Gill*, 873 S.W.2d at 48.

In the present case, however, neither of the two alleged accomplices testified at trial. Their out-of-court statements recorded on the videotapes played for the jury did not constitute “testimony” of an accomplice and therefore did not need to be corroborated. [T]he “testimony” that must be corroborated is that which is adduced “through live witnesses speaking under oath or affirmation in presence of tribunal.” ... [W]e construe the “testimony” contemplated by Article 38.14 to be of the narrower, evidentiary kind, the kind adduced in open court by live witnesses under oath. *Bingham v. State*, 913 S.W.2d 208, 210 (Tex.Crim.App.1995) (quoting *Black’s Law Dictionary* 1476 (6th ed.1990)).

Conclusion: Because there was no accomplice-witness testimony adduced at appellant’s trial, the corroboration requirement of Family Code section 54.03 was not implicated. The trial court therefore did not err in denying appellant’s directed verdict based on the assertion that the State failed to sufficiently corroborate accomplice-witness testimony. We overrule appellant’s three issues. Having overruled appellant’s three issues, we affirm the trial court’s order of commitment.

MODIFICATION OF DISPOSITION

IN MOTION TO MODIFY HEARING, TRIAL COURT DID NOT ABUSE ITS DISCRETION BECAUSE APPELLANT HAD FAILED TO SHOW THAT THE TRIAL COURT ACTED WITHOUT REFERENCE TO THE RELEVANT GUIDING RULES OR PRINCIPLES IN CHOOSING TO COMMIT JUVENILE TO TJJD.

¶ 14-3-5. **In the Matter of A.K.A.**, MEMORANDUM, No. 04—13—00666—CV, 2014 WL 2601731 (Tex.App.—San Antonio, 6/11/14).

Facts: In 2012, the State alleged that appellant, when he was fifteen-years old, had engaged in delinquent conduct—specifically, one count of aggravated sexual assault and one count of indecency with a child. Appellant pled true to the allegation of indecency with a child, and the State abandoned the other allegation. After considering the stipulated evidence, the trial court found that appellant had engaged in delinquent conduct.

At the disposition hearing, the trial court placed him on probation outside the home and committed him to the custody of the Bexar County Juvenile Probation Department until his eighteenth birthday. Condition 23 of appellant’s probation required him to cooperate fully and obey all the rules of the residential placement facility where he was placed and to remain at such facility until he completed a treatment program for sex offenders. Condition 27 of his probation required him to comply with section 54.0405 of the Texas Family

Code by attending and completing sex offender treatment and counseling, submitting a DNA sample, submitting to polygraph exams, and having his parents actively participate in his treatment sessions. See TEX. FAM.CODE ANN. § 54.0405 (West 2014). Appellant was placed at the Judge Ricardo H. Garcia Post-Adjudication Facility to participate in its rehabilitation program. Appellant was discharged from the facility after seven months because he did not successfully complete the program.

In August 2013, the State moved for the trial court to modify appellant’s disposition, alleging that appellant had violated the terms of his probation and requesting the trial court to commit him to the TJJD. Appellant pled true to two of the State’s allegations. The trial court held a hearing, and after considering the stipulated evidence and arguments of counsel, it found that appellant had violated the terms of his probation and modified his disposition to commit him to the TJJD. On appeal, appellant argues that the trial court abused its discretion when it committed him to the TJJD because the record indicates that a continuation of probation would have been a more appropriate disposition.

Held: Affirmed

Memorandum Opinion: The trial court may modify its original disposition in a juvenile justice proceeding and commit the juvenile to the TJJD if: (1) the juvenile was originally found to have committed a felony; and (2) after a hearing to modify the disposition, the court finds that the juvenile violated a reasonable and lawful court order. TEX. FAM.CODE ANN. 54.05(f) (West 2014); *In re J.P.*, 136 S.W.3d 629, 633 (Tex.2004). The trial court originally found that appellant had engaged in delinquent conduct by committing indecency with a child—a felony offense. See TEX. PENAL CODE ANN. § 21.11(d) (West 2011). Appellant’s subsequent plea of true to violations of the conditions of his probation and his stipulation to the evidence supporting his plea are analogous to a judicial confession that justified a finding that appellant had violated a reasonable and lawful court order. See *In re M.A.L.*, 995 S.W.2d 322, 324 (Tex.App.—Waco 1998, no pet.); *In re N.I.N.*, No. 04—11—00464—CV, 2011 WL 6739579, at *2 (Tex.App.—San Antonio Dec. 21, 2011, no pet.) (mem.op.). Thus, the trial court was authorized to modify appellant’s disposition and commit him to the TJJD’s custody. See *In re J.P.*, 136 S.W.3d at 633.

The trial court’s decision to modify a juvenile’s disposition to commit them to the TJJD is discretionary, and subject to review for abuse of that discretion. *In re J.P.*, 136 S.W.3d at 633. The trial court has broad discretion in determining a suitable disposition for a juvenile who has been adjudicated to have engaged in delinquent conduct, particularly in a proceeding to modify a disposition. *In re E.D.*, 127 S.W.3d 860, 862—63

(Tex.App.-Austin 2004, no pet.). The trial court abuses its discretion if it acts arbitrarily or unreasonably, or without reference to guiding rules and principles. *Id.* at 863. Although most of the trial court's decisions under the Family Code are guided by consideration of the juvenile's best interest, the best interests of juveniles who engage in serious and repeated delinquent conduct are superseded to the extent they conflict with public safety. *In re J.P.*, 136 S.W.3d at 633; see TEX. FAM.CODE ANN. § 51.01 (West 2014).

The record reflects that, although appellant successfully participated in many of the detention facility's rehabilitation programs, he failed to successfully complete his sex-offender therapy, and he was discharged from the program and the facility for that failure. Appellant failed three polygraph tests relating to his sex-offender-therapy sessions. After he failed his second polygraph test, his probation officer met with him and told him that he needed to be truthful during his sessions. The officer informed appellant that he would seek to revoke appellant's probation if he continued to lie because lying would prevent him from successfully completing sex-offender therapy. Appellant then failed a third polygraph test and did not admit that he was lying until after he was confronted with the results, at which point he admitted that he had been repeatedly lying throughout therapy. For instance, appellant admitted that he lied about not having intercourse with his victim. Appellant would also lie to his therapist about what questions he was asked in the polygraph tests and what answers he gave the polygraph examiner. For instance, after the third polygraph test, he told his therapist that he had lied to the polygraph examiner by denying that he continued to have sexual fantasies about his victim. However, when the therapist reviewed the polygraph results, they showed that appellant had actually admitted to the examiner that he continued to have sexual fantasies about the victim. Due to appellant's constant lies, his therapist concluded that appellant "was a counseling failure." His caseworker recommended that appellant be committed to the TJJD because it has "an excellent sex offender treatment program." His therapist and probation officer also recommended committing appellant to the TJJD.

At the modification hearing, the trial court found that appellant's commitment to the TJJD was appropriate because appellant's delinquent conduct was of a serious nature, appellant had violated the terms of his probation, and the appellant had failed his treatment program.

On appeal, appellant argues that the trial court should have placed him back on probation because he had a generally successful stay at the detention facility. He further argues that he should have been sent to the Pegasus School, a residential treatment facility offering a program specifically aimed at rehabilitating adolescent sex offenders. He argues that this

disposition would be far less restrictive than commitment to the TJJD and would appear to promote the same result. He points out that the facility where he had been placed did not have a special unit designated for sex offenders. Appellant argues that because the trial court declined to place him in a less restrictive environment that would meet his needs and protect the public equally as well as commitment to the TJJD, the trial court abused its discretion.

"The Texas Family Code permits a trial court to decline third and fourth chances to a juvenile who has abused a second chance." *In re J.R.C.*, 236 S.W.3d 870, 875 (Tex.App.-Texarkana 2007, no pet.) (citing *In re J.P.*, 136 S.W.3d at 633). The trial court did not need to "exhaust all possible alternatives" before committing appellant to the TJJD on a motion to modify appellant's disposition. See *id.* (citing *In re M.A.*, 198 S.W.3d 388, 391 (Tex.App.-Texarkana 2006, no pet.)); *In re N.I.N.*, 2011 WL 6739579, at *3. Although appellant suggested commitment to the Pegasus School as an alternative to commitment to the TJJD, there is nothing shown by this record that would require the trial court commit appellant to the Pegasus School rather than the TJJD. See *In re J.R.C.*, 236 S.W.3d at 875.

On the contrary, appellant's failure to successfully participate in and complete sex-offender therapy was not merely a trivial infraction of the terms of his probation. Cf. *In re J.P.*, 136 S.W.3d at 632 (suggesting that a trial court may abuse its discretion if it removes a juvenile from his home and commits him to the TJJD for a trivial infraction of his probation). The requirement that appellant complete sex-offender therapy was imposed in order to correct the actions and behaviors that led to appellant's adjudication for delinquent conduct. His failure to successfully complete that therapy implicates public-safety concerns and supports the trial court's determination that public safety would be better served if appellant continued his rehabilitation while in the TJJD. Thus, the record justifies the trial court's exercise of its discretion to commit appellant to the TJJD, and appellant has failed to show that the trial court acted without reference to the relevant guiding rules or principles in choosing to exercise that discretion.

Conclusion: We affirm the trial court's order modifying appellant's disposition.

IN MOTION TO MODIFY HEARING, TRIAL COURT DID NOT ACT ARBITRARILY OR WITHOUT REFERENCE TO GUIDING PRINCIPLES OR ABUSE ITS DISCRETION BY COMMITTING JUVENILE TO THE TJJD.

¶ 14-3-6. **In the Matter of M.A.S.**, No. 08—13—00085—CV, 2014 WL 2881561 (Tex.App.—El Paso, 6/25/14).

Facts: On December 1, 2011, M.A.S. was adjudicated for committing the offense of injury to a child, a state jail felony. See TEX. PENAL CODE ANN. § 22.04 (West 2011). In July 2012, M.A.S. was placed on supervised probation under the terms and conditions of intensive supervised probation. In October 2012, the juvenile court sustained the State's motion to modify M.A.S.'s supervised probation. In December 2012, M.A.S. was placed on out-of-home placement at New Life Treatment Center (RTC). In February 2013, the State filed a motion to modify the prior disposition, alleging that M.A.S. violated the terms and conditions of her supervised probation because she was "discharged unsuccessfully from the [RTC]." The court sustained the State's motion and set a disposition hearing.

At the hearing on the State's motion to modify, the court heard testimony regarding M.A.S.'s history with respect to probation. Jennifer Parada, M.A.S.'s probation officer, testified that M.A.S. had prior adjudications. During M.A.S.'s current probation, M.A.S. was placed on intensive supervised probation on three occasions. Parada reported that M.A.S. was placed in residential care at RTC on February 1, 2013, but was unsuccessfully discharged after 41 days due to M.A.S.'s ongoing negative behavior.

Parada testified that prior to living in RTC, M.A.S. lived with her grandmother who had been M.A.S.'s caretaker from a very young age due to M.A.S.'s mother's severe drug use.¹ According to Parada, M.A.S. has a lot of issues at home including family discord which results from M.A.S.'s failure to listen to her grandmother's directives. Parada indicated the grandmother was not in agreement with Parada's recommendation that M.A.S. be placed in the TJJD. Parada did not believe the grandmother was able to properly supervise M.A.S. Parada reported that M.A.S. had informed her that other family friends or people who had acted in a mentoring-type role to M.A.S. might be willing to have M.A.S. placed in their homes. Parada did not follow up with any of those individuals. Parada felt that placement in the TJJD was the appropriate sentence for M.A.S.

Parada also testified about M.A.S.'s treatment needs. According to Parada, M.A.S. would benefit from a behavioral modification-type program that would assess M.A.S.'s behavior and restrain her when dealing with issues that could put M.A.S. and others in danger. It was also necessary for M.A.S. to continue her medication regimen and take anger management courses. Parada believed M.A.S.'s needs could be adequately addressed by the TJJD.

Parada felt that the protection of the public and the rehabilitation and protection of M.A.S. required that a disposition be made. Parada also provided testimony concerning the efforts that she or the El Paso County Juvenile Probation Department (the

Department) made to rehabilitate M.A.S. When asked whether she felt she had exhausted all the options available at this point, Parada responded that M.A.S. had been provided with every service of the Department. Parada felt the only option left was to place M.A.S. in the care, custody, and control of the TJJD. On cross-examination, Parada testified that the Department placed M.A.S. in several services, but did not try placing M.A.S. in Lee Moor or any foster home.

M.A.S.'s modification-disposition report, the RTC discharge summary, and the TJJD eligibility letter were also admitted into evidence at the hearing. The modification-disposition report provided a summary of M.A.S.'s probation history. The report also showed that M.A.S. acquired numerous incident reports while at RTC including, "Requesting Extra Food/Self Harm, Possessing Contraband: Tongue Ring, Contraband: Scissors (verbal threats to harm a staff member), Attempted Assault of Peer/Inciting Peer/Use of Foul Language, Evading Staff Supervision, Verbal Aggression, Inciting Peer, and Destruction of Property." The report also reflected that despite the RTC staff's efforts to assist M.A.S., M.A.S.'s behavior did not improve. While at RTC, M.A.S. attended a charter school where she accumulated 21 discipline referrals for the following behaviors: "disrespecting teacher, leaving class without permission, disrespecting teachers ... use of foul language, refusal to participate in class, not complying with uniform, threatening to attack staff and refusal to attend school."

The RTC discharge summary indicates M.A.S. was discharged unsuccessfully from RTC because "[s]he ... set up a threatening environment for the other girls...." The summary describes in part, that M.A.S. tried to assault a younger peer, was combative and continued to incite and threaten peers and staff on January 7, 2013, and was restrained at school on two separate occasions for displaying threatening conduct towards others.

At the modification-disposition hearing, M.A.S.'s grandmother expressed that she wanted the best for her kids and that she wanted to take M.A.S. home. M.A.S. also read a letter she wrote to the court in which she stated that her conduct was wrong, apologized for her actions, and noted that she had changed her behavior and worked harder. Letters from two of M.A.S.'s teachers at the Delta Academy reporting that an improvement in M.A.S.'s behavior and attitude had been observed since M.A.S.'s return to the Academy were also admitted into evidence.

At the end of the disposition hearing, the court made the required statutory findings that M.A.S. was in need of rehabilitation and that protection of the child and the public required that disposition be made. The court further found that (1) it was in M.A.S.'s best interest to be placed outside of her home, (2)

reasonable efforts were made to prevent or eliminate the need for her removal from the home and to make it possible for her return, and that (2) M.A.S. could not be provided the quality of care and level of support and supervision that she needs to meet the condition of probation. Based on her findings, the court committed M.A.S. to the TJJD. This appeal followed.

Held: Affirmed

Opinion: M.A.S. argues the court abused its discretion by committing her to the TJJD because there were other community based alternatives available. In support of her argument, M.A.S. refers us to Parada’s testimony indicating that Parada did not follow up on the names of family friends who might have been willing to place M.A.S. in their homes and that Parada did not consider placing M.A.S. in Lee Moor home or any foster home. However, as correctly noted by the State, a trial court is not required to exhaust all possible alternatives before committing a juvenile to the TJJD. In *re J.A.M.*, No. 04–07–00489–CV, 2008 WL 723327, at *2 (Tex.App.-San Antonio Mar. 19, 2008, no. pet.) (mem.op.) (citing *In re J.R.C.*, 236 S.W.3d 870, 875 (Tex.App. Texarkana 2007, no pet.)). Additionally, pursuant to the Texas Family Code, a trial court is permitted to decline third and fourth chances to a juvenile who has abused a second chance. In *re J.P.*, 136 S.W.3d at 633.

M.A.S. also contends the court abused its discretion because there was no evidence the community needed to be protected from M.A.S. and M.A.S. is not the type of serious offender that requires confinement in the TJJD. The record shows M.A.S. was adjudicated for the offense of injury to a child. The State also introduced evidence that M.A.S. was violent and aggressive with others.

The RTC discharge summary reports that M.A.S. has a history of physical aggression. The summary reflects M.A.S. acquired “10 Serious Incident Reports” during her admission at RTC. M.A.S. was unsuccessfully discharged from RTC because she “set up a threatening environment for the other girls....” The modification-disposition report similarly reflects that M.A.S. had a history of violent and aggressive behavior. While in school at RTC, M.A.S. accumulated 21 discipline referrals which included threats to attack staff. The report also indicates that M.A.S. has had seven referrals to the Department, two prior adjudications, and that her supervised probation had previously been modified on two occasions. We further note that in her letter to the court, M.A.S. conceded that her behaviors and actions which included fighting, stealing, and disobeying her family were wrong. She further conceded that her behavior while in RTC was unacceptable. She also explained that while in RTC, she felt stressed out and picked on, and that she dealt with those feeling by fighting and being aggressive.

Parada testified that the Department had provided M.A.S. with every service they had available and that she felt the only option left was to commit M.A.S. to the care, custody, and control of the TJJD. The modification-disposition report lists the various services the Department provided to M.A.S. The court found that the Department exhausted all resources.

Conclusion: Based on M.A.S.’s probation history, her continued inability to follow the terms and conditions of her probation, the inadequacies present in her home environment, and her ongoing violent and aggressive behavior which led to her unsuccessful discharge from RTC, the court could have reasonably concluded that the Department has exhausted all of its options and that the protection of the public and the juvenile required that disposition be made. The court did not act arbitrarily or without reference to guiding principles. Accordingly, we conclude the court did not abuse its discretion by committing M.A.S. to the TJJD. In *re J.P.*, 136 S.W.3d at 632. Issue One is overruled. The juvenile court’s judgment is affirmed.

SEARCH & SEIZURE

THE POLICE GENERALLY MAY NOT, WITHOUT A WARRANT, SEARCH DIGITAL INFORMATION ON A CELL PHONE SEIZED FROM AN INDIVIDUAL WHO HAS BEEN ARRESTED.

¶ 14-3-9. **Riley v. California**, No. 13–132, 573 U.S. ____ (6/25/2014). On Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One.

Facts: Petitioner David Riley was stopped by a police officer for driving with expired registration tags. In the course of the stop, the officer also learned that Riley’s license had been suspended. The officer impounded Riley’s car, pursuant to department policy, and another officer conducted an inventory search of the car. Riley was arrested for possession of concealed and loaded firearms when that search turned up two handguns under the car’s hood. See Cal. Penal Code Ann. §§12025(a)(1), 12031(a)(1) (West 2009).

An officer searched Riley incident to the arrest and found items associated with the “Bloods” street gang. He also seized a cell phone from Riley’s pants pocket. According to Riley’s uncontradicted assertion, the phone was a “smart phone,” a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity. The officer accessed information on the phone and noticed that some words (presumably in text messages or a contacts list) were preceded by the letters “CK”—a label that, he believed, stood for “Crip Killers,” a slang term for members of the Bloods gang.

At the police station about two hours after the arrest, a detective specializing in gangs further examined the contents of the phone. The detective testified that he “went through” Riley’s phone “looking for evidence, because . . . gang members will often video themselves with guns or take pictures of themselves with the guns.” App. in No. 13–132, p. 20. Although there was “a lot of stuff” on the phone, particular files that “caught [the detective’s] eye” included videos of young men sparring while someone yelled encouragement using the moniker “Blood.” Id., at 11–13. The police also found photographs of Riley standing in front of a car they suspected had been involved in a shooting a few weeks earlier.

Riley was ultimately charged, in connection with that earlier shooting, with firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder. The State alleged that Riley had committed those crimes for the benefit of a criminal street gang, an aggravating factor that carries an enhanced sentence. Compare Cal. Penal Code Ann. §246 (2008) with §186.22(b)(4)(B) (2014). Prior to trial, Riley moved to suppress all evidence that the police had obtained from his cell phone. He contended that the searches of his phone violated the Fourth Amendment, because they had been performed without a warrant and were not otherwise justified by exigent circumstances. The trial court rejected that argument. App. in No. 13–132, at 24, 26. At Riley’s trial, police officers testified about the photographs and videos found on the phone, and some of the photographs were admitted into evidence. Riley was convicted on all three counts and received an enhanced sentence of 15 years to life in prison. The California Court of Appeal affirmed. No. D059840 (Cal. App., Feb. 8, 2013), App. to Pet. for Cert. in No. 13–132, pp. 1a–23a. The court relied on the California Supreme Court’s decision in *People v. Diaz*, 51 Cal. 4th 84, 244 P. 3d 501 (2011), which held that the Fourth Amendment permits a warrantless search of cell phone data incident to an arrest, so long as the cell phone was immediately associated with the arrestee’s person. See id., at 93, 244 P. 3d, at 505–506.

The California Supreme Court denied Riley’s petition for review, App. to Pet. for Cert. in No. 13–132, at 24a, and we granted certiorari, 571 U. S. ____ (2014).

Held: reversed and remanded

Opinion: ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, GINSBURG, B. REYER, S. OTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment.

The Fourth Amendment provides:

“The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

As the text makes clear, “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’” *Brigham City v. Stuart*, 547 U. S. 398, 403 (2006). Our cases have determined that “[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant.” *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646, 653 (1995). Such a warrant ensures that the inferences to support a search are “drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” *Johnson v. United States*, 333 U. S. 10, 14 (1948). In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. See *Kentucky v. King*, 563 U. S. ___, ___ (2011) (slip op., at 5–6).

The two cases before us concern the reasonableness of a warrantless search incident to a lawful arrest. In 1914, this Court first acknowledged in dictum “the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime.” *Weeks v. United States*, 232 U. S. 383, 392. Since that time, it has been well accepted that such a search constitutes an exception to the warrant requirement. Indeed, the label “exception” is something of a misnomer in this context, as warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant. See 3 W. LaFare, *Search and Seizure* §5.2(b), p. 132, and n. 15 (5th ed. 2012).

Although the existence of the exception for such searches has been recognized for a century, its scope has been debated for nearly as long. See *Arizona v. Gant*, 556 U. S. 332, 350 (2009) (noting the exception’s “checkered history”). That debate has focused on the extent to which officers may search property found on or near the arrestee. Three related precedents set forth the rules governing such searches:

The first, *Chimel v. California*, 395 U. S. 752 (1969), laid the groundwork for most of the existing search incident to arrest doctrine. Police officers in that case arrested Chimel inside his home and proceeded to search his entire three-bedroom house, including the attic and garage. In particular rooms, they also looked through the contents of drawers. Id., at 753–754.

The extensive warrantless search of Chimel's home did not fit within this exception, because it was not needed to protect officer safety or to preserve evidence. *Id.*, at 763, 768.

A

We first consider each Chimel concern in turn. In doing so, we do not overlook Robinson's admonition that searches of a person incident to arrest, "while based upon the need to disarm and to discover evidence," are reasonable regardless of "the probability in a particular arrest situation that weapons or evidence would in fact be found." 414 U. S., at 235. Rather than requiring the "case-by-case adjudication" that Robinson rejected, *ibid.*, we ask instead whether application of the search incident to arrest doctrine to this particular category of effects would "untether the rule from the justifications underlying the Chimel exception," *Gant*, *supra*, at 343. See also *Knowles v. Iowa*, 525 U. S. 113, 119 (1998) (declining to extend Robinson to the issuance of citations, "a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all").

1

Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.

2

The United States and California focus primarily on the second Chimel rationale: preventing the destruction of evidence.

Both Riley and Wurie concede that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant. See Brief for Petitioner in No. 13–132, p. 20; Brief for Respondent in No. 13–212, p. 41. That is a sensible concession. See *Illinois v. McArthur*, 531 U. S. 326, 331–333 (2001); *Chadwick*, *supra*, at 13, and n. 8. And once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.

The United States and California argue that information on a cell phone may nevertheless be vulnerable to two types of evidence destruction unique to digital data—remote wiping and data encryption. Remote wiping occurs when a phone, connected to a wireless network, receives a signal that erases stored data. This can happen when a third party sends a

remote signal or when a phone is preprogrammed to delete data upon entering or leaving certain geographic areas (so-called "geofencing"). See Dept. of Commerce, National Institute of Standards and Technology, R. Ayers, S. Brothers, & W. Jansen, Guidelines on Mobile Device Forensics (Draft) 29, 31 (SP 800–101 Rev. 1, Sept. 2013) (hereinafter Ayers). Encryption is a security feature that some modern cell phones use in addition to password protection. When such phones lock, data becomes protected by sophisticated encryption that renders a phone all but "unbreakable" unless police know the password. Brief for United States as Amicus Curiae in No. 13–132, p. 11.

As an initial matter, these broader concerns about the loss of evidence are distinct from Chimel's focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach. See 395 U. S., at 763–764. With respect to remote wiping, the Government's primary concern turns on the actions of third parties who are not present at the scene of arrest. And data encryption is even further afield. There, the Government focuses on the ordinary operation of a phone's security features, apart from any active attempt by a defendant or his associates to conceal or destroy evidence upon arrest.

We have also been given little reason to believe that either problem is prevalent. The briefing reveals only a couple of anecdotal examples of remote wiping triggered by an arrest. See Brief for Association of State Criminal Investigative Agencies et al. as Amici Curiae in No. 13–132, pp. 9–10; see also Tr. of Oral Arg. in No. 13–132, p. 48. Similarly, the opportunities for officers to search a password-protected phone before data becomes encrypted are quite limited. Law enforcement officers are very unlikely to come upon such a phone in an unlocked state because most phones lock at the touch of a button or, as a default, after some very short period of inactivity. See, e.g., iPhone User Guide for iOS 7.1 Software 10 (2014) (default lock after about one minute). This may explain why the encryption argument was not made until the merits stage in this Court, and has never been considered by the Courts of Appeals.

In any event, as to remote wiping, law enforcement is not without specific means to address the threat. Remote wiping can be fully prevented by disconnecting a phone from the network. There are at least two simple ways to do this: First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an enclosure that isolates the phone from radio waves. See Ayers 30–31. Such devices are commonly called "Faraday bags," after the English scientist Michael Faraday. They are essentially sandwich bags made of aluminum foil: cheap, lightweight, and easy to use. See Brief for Criminal Law Professors as Amici Curiae 9. They may not be a

complete answer to the problem, see Ayers 32, but at least for now they provide a reasonable response. In fact, a number of law enforcement agencies around the country already encourage the use of Faraday bags. See, e.g., Dept. of Justice, National Institute of Justice, *Electronic Crime Scene Investigation: A Guide for First Responders* 14, 32 (2d ed. Apr. 2008); Brief for Criminal Law Professors as Amici Curiae 4–6.

B

The search incident to arrest exception rests not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody. The United States asserts that a search of all data stored on a cell phone is "materially indistinguishable" from searches of these sorts of physical items. Brief for United States in No. 13–212, p. 26. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

1

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers. One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. See Kerr, *Foreword: Accounting for Technological Change*, 36 Harv. J. L. & Pub. Pol'y 403, 404–405 (2013).

But the possible intrusion on privacy is not physically limited in the same way when it comes to cell phones. The current top-selling smart phone has a standard capacity of 16 gigabytes (and is available with up to 64 gigabytes). Sixteen gigabytes translates to millions of pages of text, thousands of pictures, or hundreds of videos. The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal

much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. See *United States v. Jones*, 565 U. S. ___, ___ (2012) (SOTOMAYOR, J., concurring) (slip op., at 3) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

Mobile application software on a cell phone, or "apps," offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible on the phone indefinitely. There are over a million apps available in each of the two major app stores; the phrase "there's an app for that" is now part of the popular lexicon. The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life. See Brief for Electronic Privacy Information Center as Amicus Curiae in No. 13–132, p. 9. In 1926, Learned Hand observed (in an opinion later quoted in *Chimel*) that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." *United States v. Kirschenblatt*, 16 F. 2d 202, 203 (CA2). If his pockets contain a cell phone, however, that is no

longer true. Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form— unless the phone is.

2

To further complicate the scope of the privacy interests at stake, the data a user views on many modern cell phones may not in fact be stored on the device itself. Treating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained as an initial matter.

IV

We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.

Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is “an important working part of our machinery of government,” not merely “an inconvenience to be somehow ‘weighed’ against the claims of police efficiency.” *Coolidge v. New Hampshire*, 403 U. S. 443, 481 (1971). Recent technological advances similar to those discussed here have, in addition, made the process of obtaining a warrant itself more efficient. See *McNeely*, 569 U. S., at ___ (slip op., at 11–12); *id.*, at ___ (ROBERTS, C. J., concurring in part and dissenting in part) (slip op., at 8) (describing jurisdiction where “police officers can e-mail warrant requests to judges’ iPads [and] judges have signed such warrants and e-mailed them back to officers in less than 15 minutes”).

Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. “One well-recognized exception applies when “the exigencies of the situation” make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.” *Kentucky v. King*, 563 U. S., at ___ (slip op., at 6) (quoting *Mincey v. Arizona*, 437 U. S. 385, 394 (1978)).

Conclusion: Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans “the privacies of life,” *Boyd*, *supra*, at 630. The fact that technology now allows an individual to carry such information in his hand does not make the information

any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple— get a warrant.

We reverse the judgment of the California Court of Appeal in No. 13–132 and remand the case for further proceedings not inconsistent with this opinion. We affirm the judgment of the First Circuit.

It is so ordered.

SUFFICIENCY OF THE EVIDENCE

EVIDENCE WAS CONSIDERED INSUFFICIENT TO SUPPORT A CONVICTION FOR OFFICIAL OPPRESSION BY JP, WHERE EVIDENCE SHOWED THAT APPELLANT’S INTERPRETATION OF THE LAW WAS DIFFERENT FROM THE STATE’S INTERPRETATION AND FROM WITNESSES’ INTERPRETATION, AND AS A RESULT, APPELLANT ACTED WITH A REASONABLE BELIEF THAT HER COURT HAD BEEN GRANTED JURISDICTION TO DO THE COMPLAINED-OF ACTS.

¶ 14-3-12. *Palacios v. State*, No. 13-11-00254-CR, --- S.W.3d ---, 2014 WL 3778170 (Tex.App.-Corpus Christi, 7/31/14).

Facts: At appellant’s trial, the State presented testimony from a variety of lay witnesses as to whether appellant’s court lacked jurisdiction to issue the warrants for De Luna. The State also presented testimony from De Luna and Trevino, among others. The trial court admitted State’s Exhibits 1 through 16, which include a variety of documents filed in appellant’s court and with the Hidalgo County Sheriff’s Office (the “HCSO”).FN10 The trial court also admitted copies of the text of articles 45.057, 45.058, 45.059, and 45.060 of the Texas Code of Criminal Procedure. Appellant presented testimony from several witnesses. The trial court also admitted Defendant’s Exhibit 1, which is a memo sent on May 5, 2008 to the Hidalgo County Sheriffs Office requesting that any defendant incarcerated for a *capias pro fine* issued under her authority be released on a promise to appear.FN11

FN10. Specifically, we have reviewed, among many other things, the following pertinent documents: (1) An order signed on January 28, 2010 granting De Luna’s application for writ of habeas corpus seeking release for lack of probable cause; (2) an order discharging De Luna from custody; (3) documents filed in appellant’s court regarding Trevino; (4) documents filed in appellant’s court regarding Diaz; (5) documents filed in appellant’s court regarding De Luna; (6) a handwritten list of the employees of appellant’s court and their respective titles; (7) a handwritten note appearing to detail appellant’s actions in Trevino’s case; (8) a form from the Hidalgo County Juvenile Center’s Probation Department stating that De Luna was placed on Judicial

Probation on January 24, 2008 due to contempt of court; and (9) a memo sent on October 8, 2009 from appellant to Guadalupe “Lupe” Trevino, then the Hidalgo County Sheriff, requesting that any person that was incarcerated for a *capias pro fine* be arraigned.

FN11. Article 45.045 of the Texas Code of Criminal Procedure provides that

(b) A capias pro fine may not be issued for an individual convicted for an offense committed before the individual's 17th birthday unless:
(1) the individual is 17 years of age or older;
(2) the court finds that the issuance of the capias pro fine is justified after considering:
(A) the sophistication and maturity of the individual;
(B) the criminal record and history of the individual; and
(C) the reasonable likelihood of bringing about the discharge of the judgment through the use of procedures and services currently available to the court; and
(3) the court has proceeded under Article 45.050 to compel the individual to discharge the judgment.
See TEX.CODE CRIM. PROC. ART. 45.045 (West, Westlaw through 2013 3d C.S.) (Emphasis added).

Neither party provided this statute to the jury. However, this statute establishes that a justice court is authorized, under the circumstances listed, to issue a *pro capias* fine for an individual who committed an offense when under the age of seventeen.

In its opening remarks, the State prosecutor stated the following: FN12

FN12. We have included the State's opening and closing remarks because those remarks are relevant to our understanding of the State's theories as to how appellant's acts were unlawful.

May it please the Court, opposing counsel, co-counsel. Good afternoon.

In January of last year, 2010, Public Defender Jaime Gonzalez was happening just to go through a list of the jail rosters. He came across a name, Francisco De Luna, and he noticed that he was in jail approximately 18 days on a Class C misdemeanor, raised all types of red flags for him because normally, for him, he notices when somebody is in jail more than 15 days on a Class B misdemeanor. He tries to get them out. They've been in jail too long.

It's his responsibility as a public defender. He's been charged or he's been requested by the

County Commissioner's Court to ensure that—that—to make sure that all of those defendants who are in jail, especially those misdemeanor offenses, that they are not spending too much time in jail because we have—we spend so much money every day on these defendants that every time they are in county jail, taxpayers have to pay so much money per day for them and also to protect their rights.

So this is what started the whole thing. And when—about the case, the eventual civil case and the eventual criminal case against Judge Mary Alice Palacios. You're going to find through the evidence—and the evidence is going to be in the form of exhibits and the form of testimony. And those exhibits all are going to come from Judge Mary Alice Palacios's court.

You're going to find that these exhibits are very—they're dismal. But—but the evidence is there nonetheless. And all of this is from her court, all of these exhibits, primarily all of them.

And you're going to notice with Francisco De Luna that he had multiple failure to attend cases, including, also, failure to comply cases, as well, but, regardless, they were all Class C misdemeanors, juvenile offenses.

You're going to find that Judge Mary Alice Palacios signed orders transferring each and every one of [De Luna's] cases, except for the last one, 22 orders transferring. You're going to learn that by doing so, she no longer has jurisdiction of a case. And just like Judge Aida Salinas Flores mentioned during voir dire, a Court must have jurisdiction over a defendant. She waived that jurisdiction by sending all those cases over to juvenile court.

He [De Luna] goes to juvenile court. There is a—at some point there is a letter sent to Judge Mary Alice Palacios's court, this is a letter by the juvenile court that's sent to all public officials, including police departments, that says that the family did not respond to services and the cases are being closed. Nowhere on that letter is there a signature by the judge transferring the case back, nothing of that nature.

Francisco De Luna goes to juvenile court, he's put on probation for the cases that Judge Mary Alice Palacios transfers up to juvenile court, he does his time, [and] he does his juvenile probation. The day—or close around about the time he turned 17, Judge Mary Alice Palacios issues out what's called a birthday letter under 45.060 [of the Texas Code of Criminal Procedure FN13]. It's one of the statutes you got to view during voir dire.

FN13. Article 45.060 appears in the Texas Code of Criminal Procedure chapter forty-five, subchapter B, which sets out the procedures for justice and municipal courts. Article 45.060 states:

Unadjudicated Children, Now Adults; Notice on Reaching Age of Majority; Offense

(a) Except as provided by Articles 45.058 and 45.059, an individual may not be taken into secured custody for offenses alleged to have occurred before the individual's 17th birthday.

(b) On or after an individual's 17th birthday, if the court has used all available procedures under this chapter to secure the individual's appearance to answer allegations made before the individual's 17th birthday, the court may issue a no-tice of continuing obligation to appear by personal service or by mail to the last known address and residence of the individual. The notice must order the individual to appear at a designated time, place, and date to answer the allegations detailed in the notice.

(c) Failure to appear as ordered by the notice under Subsection (b) is a Class C misdemeanor independent of Section 38.10, Penal Code, and Section 543.003, Transportation Code.

(d) It is an affirmative defense to prosecution under Subsection (c) that the individual was not informed of the individual's obligation under Articles 45.057(h) and (i) or did not receive notice as required by Subsection (b).

(e) A notice of continuing obligation to appear issued under this article must contain the following statement provided in boldfaced type or capital letters:

"WARNING: COURT RECORDS REVEAL THAT BEFORE YOUR 17TH BIRTHDAY YOU WERE ACCUSED OF A CRIMINAL OFFENSE AND HAVE FAILED TO MAKE AN APPEARANCE OR ENTER A PLEA IN THIS MATTER. AS AN ADULT, YOU ARE NOTIFIED THAT YOU HAVE A CONTINUING OBLIGATION TO APPEAR IN THIS CASE. FAILURE TO APPEAR AS REQUIRED BY THIS NOTICE MAY BE AN ADDITIONAL CRIMINAL OFFENSE AND RESULT IN A WARRANT BEING ISSUED FOR YOUR ARREST."

See *id.* art. 45.060 (West, Westlaw through 2013 3d C.S.).

And that letter, she sends it out, and then she has him arrested. He was originally supposed to spend, according to her—her order of arrest—she adjudicated him to arrest. He was supposed to spend 100 and some odd days for about \$10,000 worth of fines. She stacked all of the fines in the cases he had been in her court for, even though she knew she had already transferred the cases.

How do we know she knew? She signed 22 orders transferring.

That individual who was in here, he would have spent a long time in the county if it hadn't been for Jaime Gonzalez seeing the injustice. So essentially, Ladies and Gentlemen, what we discussed during voir dire, double jeopardy violation of a Fifth Amendment right. He served two punishments for the same crime. There is no getting around orders to transfer. That's just one.

....

The last one Leroy Trevino. This is an individual who did everything and appeared every time he was supposed to report. He appeared multiple times. He was told to go to—he was put under full disposition.

And then eventually—when he was told to come back, he came back every time and, actually, there is a notation in his file that says the case was going to be closed by her court staff because he was doing everything he needed to do. And then the next entry says, no, he needs to pay court costs and fines. There is eight months of inactivity on this file, eight months of inactivity.

A birthday letter is sent out, sent out, and he appears. He appears at her court. We know that because it's in the file. Yet she still arrests him for failure to appear even though he showed up on the date the summons told him to. It will state on the warrant, failure to attend school, and in parenthesis it will say FTA. According to her court staff, that's failure to appear. Regardless if they say otherwise, it's failure to attend school.

Remember the statutes we read during voir dire. You can't jail them for those fines because those are juvenile cases.

Ladies and Gentlemen, we bring these three before you and ask you that you not judge those individuals for their actions. We're here on Judge Mary Alice Palacios. And I know that you would want the same rights for yourself and your children and everybody else you know. Everybody has a fair trial, including the judge. It should be the same way those individuals who appeared before her.

They came with their parents before her. Pay up or you're going to jail, no ifs, ands or buts. I don't understand. Why do I have to pay when I'm on deferred? Why am I going to have to suddenly pay? Why am I being subjected to arrest? Just take him away.

Ladies and Gentlemen, she knew the law. He appeared before her, and he was arrested. Those are constants. The orders are constants, the

summons are constants. They cannot change at all.

The witnesses that you will hear, the majority of them, are all her court staff. They are very loyal to her. But they are State's witnesses because we have to have them to testify. I just want you to remember that. Just because they're State's witnesses—they are still employed by her office. And a lot of those people that you saw in here come in—she has 20 some odd employees.

There is going to be a lot of testimony, I'm sure, that she has a big docket. You're going to learn that she goes out and recruits—and recruit business, recruit truancy, failure to attend cases, from the school districts.

When someone goes out and runs for this position, gets paid quite a bit of money from Hidalgo County, goes out and tries to round up more business from school districts and also more monies from them, she knows the law.

We don't know why she's doing this, bending the law to her favor, but it was happening, and the evidence is there. The law is there. We are confident when you look at these documents and hear testimony, the law—the law, you will find Mary Alice Palacios guilty of three counts of official misconduct. Thank you.

A. The Chief Public Defender, Jaime Gonzalez testified that the Public Defender's Office of Hidalgo County “absorb[s] currently 40 percent of the caseload in misdemeanor cases” and that he reviews the jail roster log in order to assist defendants who are in jail for misdemeanor offenses to get out of jail as quickly as possible. Gonzalez stated that his office “normally” “covers Class A and Class B misdemeanors.” “According to Gonzalez, Class C misdemeanors are fine-only offenses. Gonzalez stated that he was reviewing a client's case who had committed a Class C misdemeanor, and he was conducting a “random check[]” of the jail roster because “people fall through the cracks and even though they're disposed of, they should be released, they remain in custody.” Gonzalez testified that while he was checking on his client, FN14 he discovered that De Luna had been in jail for eighteen days for similar reasons as his client. FN15 Gonzalez believed that De Luna had been confined due to warrants that appellant had issued. Gonzalez could not recall exactly how long De Luna had been ordered to stay in custody but believed De Luna was required to serve approximately fifty or sixty days. Gonzalez stated that De Luna told him that he had “roughly, \$8thou [sic] or so of fines, and he could not pay it and that he was told if he could not pay it, he had to serve time in jail.”

FN14. Jaime Gonzalez could not recall his client's name. Gonzalez explained that he recalled that his client's cases had arisen out of the Justice of the Peace Court, Precinct 4, Place 2 appellant's court.

FN15. Gonzalez did not elaborate.

According to Gonzalez, he reviewed the Texas Code of Criminal Procedure and stated, “[I] basically just did a—in my opinion, a quick look over, if there was anything that I could see that if this was correct under the law. “The prosecutor then asked, “So once you determined that he was in there improperly, what did you do?” Gonzalez responded, “At that point I—again, I wasn't confident of my interpretation of—of the Juvenile Code section, so I contacted Eric Schreiber with the District Attorney's Office to explain to him my position of my concern with Mr. De Luna and the other [unnamed] individual, their incarceration, and I—that was the next thing.” FN16 Gonzalez testified that “Mr. Schreiber ... considered it a gray area. He didn't—he didn't understand what I was saying either. We were kind of talking back and forth, so with Mr. Schreiber, I know that Mr. Schreiber and myself wanted to speak to Homer Vasquez with the District Attorney's Office.” FN17 And I again explained my position on the interpretation of the law.”

FN16. Eric Schreiber did not testify at trial.

FN17. Homer Vasquez did not testify at appellant's trial.

Gonzalez stated that after conferring with the other men, he filed a petition for writ of habeas corpus requesting that De Luna be released because he was being held improperly. Gonzalez testified that he filed the writ of habeas corpus because he “believe[d] De Luna] was in custody illegally and that is the order to the [c]ourt, and it was granted by Judge Rudy Gonzalez.” FN18 The trial court admitted the orders signed by the District Court judge granting habeas corpus relief and ordering that De Luna be released from jail. The trial court overruled defense counsel's objections to the orders on the bases that: (1) they were not relevant to the arrest issue because the orders concerned confinement issues; and (2) admission violated rule of evidence 404(b).

FN18. Although the trial court admitted the order granting De Luna's writ of habeas corpus, in this case, the State did not seek admission of the reporter's record of the habeas corpus proceeding.

Gonzalez admitted that he did not review the documents that were filed in appellant's court regarding De Luna. Gonzalez stated he did not conduct an investigation into the facts, and “[i]t was just a cursory review of the law and what [he] saw off the criminal case management system, Able Term, on my computer, basically.” According to Gonzalez, the Able

Term system documented that De Luna was arrested “for possession of marijuana, a Class B misdemeanor.” When the prosecutor asked, “And then he was—then that case [the marijuana possession case] was taken care of.... And then he was arrested on those [juvenile] offenses,” Gonzalez replied, “He was arrested for possession of marijuana, Class B misdemeanor, and he disposed of the case and he continued to remain in custody on the [juvenile] offenses listed in [State’s] Exhibit No. 2.” FN19 The prosecutor asked, “And in order for him to have been in custody on those offenses, he had to have been originally arrested for those,” Gonzalez responded, “Correct.” Gonzalez believed “[f]rom what [he] saw” that De Luna committed all of the offenses before he turned seventeen and that De Luna was arrested for those offenses.

FN19. The offenses listed in State’s Exhibit 2 include the following: (1) eight counts of “Failure to Comply with Directive—Class C Misdemeanor,” one count with a fine of \$407.00 and the others each with a fine of \$416.00; (2) one count of “Excessive Tardies—Class C Misdemeanor” with a \$407.00 fine; (3) ten counts of “Fail to Attend School—Class C Misdemeanor” each with a fine of \$533.00; (4) three counts of “Abusive Language in School—Class C Misdemeanor,” each with a fine of \$416.00; (5) one count of “Disruption of Class—Class C Misdemeanor,” with a \$416.00 fine; and (6) one count of “Rules and Penalties—Class C Misdemeanor,” with a \$416.00 fine.

When asked to describe his understanding of “double jeopardy,” Gonzalez said,

My understanding is when a person is accused of a crime, when he—either when he’s acquitted or found not guilty in a trial or there is a conviction, he cannot be retried in a trial or there is a conviction, he cannot be retried for the same crime or a similar crime after he’s been acquitted or convicted. [FN20]

FN20. The trial court admitted Gonzalez’s testimony regarding his understanding of double jeopardy after overruling appellant’s objection that Gonzalez was not designated an expert witness. The trial court explained that the State designated Gonzalez as a witness and all parties were aware that he is a lawyer. The trial court also took judicial notice that as a lawyer, Gonzalez has “specific knowledge and understanding” of double jeopardy.

Gonzalez agreed with the prosecutor that double jeopardy encompasses “multiple punishments for the same crime.”

The State asked Gonzalez if he was “aware of where Mr. De Luna was arrested,” and Gonzalez replied, “I am not aware exactly where he was arrested. I know that he was originally arrested for a possession of marijuana charge.” Gonzalez testified that he spoke with

appellant about De Luna’s case and that appellant “had a different interpretation than” his own interpretation of the “two article sections” they discussed. The prosecutor asked if appellant was “angry.” Gonzalez replied, “I wouldn’t say she was angry, but she was—I recall that she did—she was forceful, raising her voice and her position, defending her position.”

On cross-examination, Gonzalez stated that he did not know that there were twenty-two warrants for De Luna’s arrest. Gonzalez knew that there were ten offenses related to failure to attend school. Gonzalez agreed with appellant’s defense counsel that in a criminal case, the accused will make several appearances in court. Appellant’s defense counsel asked, “Now, sir, tell the jury what a judge can do if an accused individual fails to make any of those appearances?” Gonzalez replied, “A judge can order what’s—an order for their arrest for failure to appear [in court].” Gonzalez did not know who would have had the obligation to notify the accused that he was summoned to appear in court, but he “believed” the notice would come from either the “County Clerk’s Office or from the actual court.” Gonzalez testified that an accused has an obligation to keep the authorities “apprised” of his address. Gonzalez explained that he wanted Schreiber’s opinion regarding De Luna’s situation because Schreiber was a prosecutor in appellant’s court. When appellant’s trial counsel asked Gonzalez if appellant had issued the warrants for De Luna’s arrest for his failure to appear, Gonzalez said, “The warrant that I saw, the ten that are listed on Exhibit 2, were for failure to attend school, from what I saw, and other charges, abusive language, I believe is one of them, I can’t remember exactly.” FN21

FN21. The State and Gonzalez interpreted the “FTA” notations differently. In Trevino’s case, the State alleged that “FTA” meant that the warrants were issued for failure to appear in court. Gonzalez stated that none of the warrants in De Luna’s case were for failure to appear in court, although all of the warrants in De Luna’s case have the “FTA” notation.

On re-direct examination, the prosecutor stated, “Now, you’re not familiar with JP law or Municipal Court law, are you?” Gonzalez responded, “I am not familiar with it [especially when it comes to juveniles].” Gonzalez testified that he does not “handle” truancy or failure to attend cases. The prosecutor then published article 45.060(a) of the Texas Code of Criminal Procedure and asked Gonzalez to read it. Gonzalez said, “It says, A, Except as provided by Articles 45.058 and 45.059, an individual may not be taken into secured custody for offenses alleged to have occurred before the individual’s 17th birthday.” The prosecutor asked, “Okay. Now, the offenses in which you have said that the defendant [De Luna] was arrested on and—and detained were on offenses he committed before his 17th birthday?” Gonzalez replied, “That was my—that was my interpretation, yes.”

On re-cross examination, Gonzalez stated that a person is considered an adult when he or she turns seventeen and agreed that a person who is seventeen can be placed in “se-cured custody” and go to jail. Gonzalez recalled that all of the offenses occurred when De Luna was younger than seventeen. Gonzalez stated that he did not know when appellant issued warrants for “the failure to appear offenses.” FN22

FN22. Previously, when asked if appellant had issued the warrants against De Luna for his failure to appear, Gonzalez stated, “The warrant that I saw, the ten that are listed on Exhibit 2, were for failure to attend school, from what I saw, and other charges, abusive language, I believe is one of them, I can’t remember exactly.”

B. Appellant’s Court Coordinator, Roberto Leal
Leal testified that he had worked as the court coordinator for appellant’s court for approximately seven years. Leal stated, “I pretty much handle a variety of things, the scheduling of her dockets, civil, criminal, you know, truancy court dates.” On cross-examination, Leal explained that appellant’s court “has a civil docket which have to do with small lawsuits under [\$]10,000, evictions. Lately we’re doing towing hearings, unlawful towing. We do justice civil courts, we do peace bonds, we do criminal traffic” and death inquests.

Leal testified that appellant was required to have eighty hours of training in her first year on the bench and then she was required to attend twenty hours of training every year. Leal agreed that the majority of appellant’s cases were truancy cases. Leal explained “the process that a person goes through when they are accused of being truant” as follows:

It goes from the filing of a case, whether it’s a juvenile or an adult, either in the form of a complaint or a citation, and it gets given a docket number. It’s processed. And a process, we mean—I mean it’s input into the system of Able Term, as the County uses it through our clerks, the truancy clerks. From there on out, it’s taken to the case managers, and we send up the ticket—if it’s a ticket, for the most part, a court date is already on the ticket that’s signed by the juvenile or the defendant, in particular, whether it’s a juvenile or an adult. When it’s a complaint, we send out to—a summons to the address that’s provided to us once it’s filed. If—if it’s a—and that’s on a complaint or a ticket.

Once we go to court, everybody signs in, everybody gets the parent—the parents, if it’s a juvenile, they have sign-in sheets to get their information, to get John Doe’s mother’s name, their date of birth, their current address. They fill it out for us so we can put it in the file, and if for

whatever reason they have to come back, at least that’s what we know that we have for them. Once they are seated in, the Judge would admonish them, once they are all there, give them their rights, whatnot.

From there on out, the case managers would get the file, start looking through them to see which ones are their first times there; first timers I mean they’ve never been in trouble before, it’s the first time they appear in court and just talk to the parents. Everything was a case-by-case basis.

They would also assess the cases that were set for status. These were people asked to come back under Court order to see how they’re doing, to do a checkup. You know, they were all referred for a drug test to see if anyone were positive or negative, just so we can narrow down why they’re being truant. If they’re positive for drugs, we can focus on that. If they were negative, they would do community service at the Boys and Girls Club Teen Court, you know, but that’s pretty much how the process was.

Everything was on a case-by-case basis. If they are asked to come back, it varies. It would vary if they didn’t come back. I mean, it’s a big process.

Leal explained that once the child comes into the court on a charge of truancy, that child is read his rights and enters a plea of guilty or not guilty. Leal stated that if the child pleads guilty, the court defers disposition and puts the child on probation. If the child complies with the conditions of probation, then “there is [sic] no court fees that are actually collected if he is compliant.” The judgments are written, and the conditions are provided in writing to the child.

Leal stated that as the judge, appellant would sign the orders that the child was responsible for following. “The case managers would assess the cases.... If they would say they need to do Teen Court or whatever that they—the person or the defendant was asked to do by a case manager, and the judge would enforce the judgment if she agreed with that.” Leal agreed that only the judge has the authority to issue a fine and enforce the conditions. However, the case managers would make recommendations and fill out the paperwork. “Signing the judgment would be the judge. Of course, she would look over them before to make sure everything was where it was supposed to be, and the case managers would fill out, if they could, and not leave the judge on the stand.”

Leal explained that “deferred adjudication” occurs when the defendant is “put on probation from the date of judgment,” and there are several conditions “just on truancy that she can ask you to be on throughout probation. The probation can vary from one month,

two months, [or] three months. What it is [] that during that deferral period, whatever the time frame may be, the judge is—if [the defendant] complied again, the original fine assessed is waived, which is the County fine.” Leal agreed with the prosecutor that in deferred adjudication situations, the fine was also being deferred. Leal testified that court costs are not deferred and are mandatory according to the county auditors because court costs are only waived if the district attorney's office dismisses the case.

Leal stated that if the defendant did not comply with the conditions, the defendant is “brought back to court, and we had—we work with several agencies so they give us stats, statistics on—John Doe was referred and he hasn't gone, even though it was on his judgment.” The defendant is then “brought back” to the court for a “show-cause hearing” where the defendant is asked to explain to the judge his or her reasons for not complying with the conditions of probation.

On cross-examination, appellant's defense counsel asked, “Are you able to tell the jury how many of [25,000 to 26,000 children in the] truancy cases” that appellant presided over came back to appellant's court, Leal said, “You would—honestly between those cases, you could say that—I would say maybe a fourth or maybe half, towards the middle, come back. Other first-timers we never see again.” Leal stated that the “success rate of the truancy program conducted by” appellant is “about 89 to 90 percent success rate based on statistics [the court] receives from the other agencies, which are New Beginnings and Teen Court.”

Defense counsel then asked Leal to review the documents admitted into evidence regarding De Luna's case. Leal agreed that there were “about” twenty-five truancy exhibits regarding De Luna. Leal reviewed Exhibit 90 and described it as “a warrant for Francisco De Luna.” Leal testified that the Edinburg Consolidated Independent School District had filed in appellant's court a complaint alleging that De Luna had failed to attend school. Warrants had then been “drafted and done in [the court's] office.” Leal testified that the records also contained three letters that were “FTA, which is failure to appear.” When asked if the warrant was for failure to appear, Leal replied, “It's more for a case manager, but, I mean, it runs the same as ours. You could say that they failed to appear for that original court setting that they were asked to as an adult.” Leal testified that based on the documents, De Luna failed to appear “about 23, 22, 23, yes” times.

Leal explained that they mail the notices to the defendant's residence at the addresses provided by the school districts and that it is the defendant's duty to keep the court in-formed of his or her change of address. Citations are sent to the defendants telling them when and where to appear. Leal testified that based on the documents before him, De Luna and his mother missed the court dates that they were ordered

to attend. Leal stated that without the paperwork, he has no independent recollection of De Luna.FN23

FN23. Leal also testified regarding Diaz's documents.

Defense counsel asked Leal to explain appellant's philosophy regarding the truancy cases. Leal said:

Judge Palacios is not so much about collecting revenue. As far as these cases go, if you want to run numbers on how many delinquent—or how many fines we have out there for students that haven't appeared, we have a lot to collect. If anything, it's about getting kids back in school, you know, for the most part because nothing is collected. And to say that Jane Doe or John Doe was in court—we didn't collect anything there, no. Everything waits after the case is finalized, whatever the outcomes may be, but it's more about having these kids go to school, and if they have a drug problem, to take care of that, a family problem, to take care of that. It varies.

Leal explained that the forms that are used in appellant's court are approved by the “D.A.'s office ... particularly Eric Schreiber because he is the ADA that's assigned to our court. You know, that's who we have gone to for the most part if anything—we have questions in reference to a particular case or circumstances of a case.” According to Leal, Schreiber “never” alerted him “to any potential problems” concerning the truancy cases in appellant's court.

On re-direct-examination, the prosecutor asked Leal to review the documents related to De Luna's case in appellant's court. Leal established that appellant signed an order transferring De Luna's case to the juvenile court on March 8, 2007, issued the “birthday letter” on December 17, 2008, and issued the warrant for De Luna's arrest on January 21, 2009. Leal agreed with the prosecutor that a notation regarding the transfer of De Luna's case to juvenile court appeared on the docket sheet. Leal clarified that there were twenty-two orders of transfer in De Luna's case. The prosecutor asked, “All these cases are on this birthday letter for basically notifying them, setting them up to get arrested when he turns 17 for the same offenses that were transferred to juvenile court. Are all of these the same cases?” Leal responded, “Yes, ma'am.”

Leal acknowledged that State's Exhibit 9X did not include “anything about [an] order transferring [De Luna's] cases back” to appellant's court. State's Exhibit 9X is a document from the Hidalgo County Juvenile Center entitled, “Disposition.” It states, in relevant part, that “On 3/23/07 a referral was received” from appellant's court regarding De Luna's alleged “contempt of court.” The document states, “Please be advised the following action has been taken.” The document then lists several possible actions. However, none of these actions are checked. Instead, in a section

entitled “Additional Information,” the document states in hand writing the following: “[The] family did not respond for services.” The document is signed by a juvenile probation officer.FN24On re-cross examination, appellant’s trial counsel asked if State’s Exhibit 9X was sent in response “to your requests or to Palacios’s requests to appear in your court on this case,” Leal said, “No.” On re-direct examination, Leal agreed with the prosecutor that State’s Exhibit 9X was sent before the transfer of De Luna’s cases to juvenile court.

FN24. We are unable to determine who signed the document because the signature is illegible.

C. Appellant’s Former Case Manager, Marcela Adela Cherry

Cherry testified that she is currently employed with the Texas Attorney General’s Office as a field investigator. Cherry began working in that office on December 13, 2010. Prior to that date, Cherry worked in appellant’s court as a case manager. Cherry held that position from “September of 2008 up until December of 2010.” Specifically, Cherry handled “[t]ruancy or school-related offenses.” Cherry said, “The majority of the training [that she] received was on-the-job training” from appellant. The prosecutor asked if Cherry was aware that appellant “signed arrest warrants for failure to appear for those who turn 17,” and Cherry replied, “After a notice for continuing obligation was mailed.... Yes.” Cherry could not tell the jury how many of the notices had been mailed from appellant’s court to defendants.

When asked by the prosecutor, Cherry identified State’s Exhibit 9A as “a notice of continuing obligation.” Cherry read the notice as follows:

Our court records reveal that before [your] 17th birthday, you were accused of a criminal offense and have failed to make an appearance or enter a plea in this matter. As an adult, you are notified that you have a continuing obligation to appear in this case. Failure to appear as required by this notice may be an additional criminal offense and [may] result in a warrant being issued for your arrest.[FN25]

FN25. This notice tracks the language of article 45.060 of the Texas Code of Criminal Procedure. See TEX.CODE CRIM. PROC. ANN. art. 45.060.

Cherry acknowledged that there was an order transferring De Luna’s cases from appellant’s justice court to the juvenile court. The prosecutor asked, “Once this order is signed and the case is transferred—once this order is signed, the judge, Mary Alice Palacios, loses jurisdiction; isn’t that right?” Cherry responded, “It’s my understanding that at least for a time being she does.” The prosecutor asked, “What’s the time being,”

and Cherry said, “Well, if the juvenile probation sends us a letter back saying that they are not going to take on the case, we—we, in a sense, keep it again.”

The prosecutor asked Cherry to review the documents included in State’s Exhibit 7A and 7B.FN26Cherry said that a “commitment order” signed by appellant appeared in the documents included in State’s Exhibit 7A and explained that she understood that a “commitment order” signed by a justice of the peace “commit[s] that person to jail for a specific charge.” Cherry stated that the specific charge against Trevino was “Failure to at-tend school, failure to appear.” Cherry explained that the “Notice of continuing obligation” would have been sent before the individual could be arrested for failure to appear. Cherry had never heard the “notice of continuing obligation” referred to as “a birthday letter.”

FN26. State’s exhibits 7A and 7B contain over thirty pages of documents. It is un-clear exactly which documents Cherry reviewed during her testimony. However, we have reviewed all of the documents in State’s Exhibit 7A, which include: (1) the docket sheet for Trevino’s case; (2) two forms from appellant’s court regarding Trevino’s case with handwritten notes (the handwriting is messy and in some places indecipherable); (3) a “Student Information” form, received in appellant’s court on February 11, 2008, with an absent record log showing that Trevino was absent from school on January 21, 22, 24, 28, and February 1, 4, 5, and 6; (4) a referral for failure to attend school classes from Tiburcio Canas regarding Trevino’s absences from school; (5) a complaint signed by Canas alleging that Trevino failed to attend school for three or more days or part of days in a four week period; (6) Canas’s affidavit stating that Trevino failed to attend school; (7) three summons from appellant’s court to Trevino’s parents informing them that Trevino had to appear in her court on March 13, 2008, April 10, 2008, and October 16, 2008; (8) the “birthday letter” sent from appellant’s court to Trevino ordering him to appear on August 4, 2009; (9) a “Notice to Show Cause for Failing to Obey Deferred Disposition Order”; (10) an order for Trevino to “pay the entire fine and costs adjudged at the end of this hearing”; (11) a “Waiver of Alternative Sentencing and Request for Incarceration in Satisfaction of Fine and Costs” signed by Trevino; (12) an order of commitment issued by appellant stating that Trevino should remain in custody “for the time required by law to satisfy the amount of” his fine of \$537.00; and (13) a warrant to arrest Trevino issued by appellant.

We have also reviewed the documents in State’s Exhibit 7B which include the following: (1) case manager’s notes regarding Trevino’s case; (2) two forms from appellant’s court with handwritten notes regarding Trevino’s case; (3) an affidavit signed by Canas stating that Trevino had failed to attend school; (4) a complaint

signed by Canas; (5) a “Student Information” form with an absent record log showing that Trevino had been absent on February 7, 8, 11, 12, 13, 18, 19, 20, 21, 28, 29 and March 3, and 6, which was received on March 11, 2008 by appellant’s court; (6) a “Referral for Failure to Attend School Classes” from Canas to appellant’s court regarding Trevino; (7) “Minutes of the Justice of the Peace Court” deferring Trevino’s adjudication; (8) a summons for Trevino to appear in appellant’s court on October 16, 2008; (9) a “birthday letter” summoning Trevino to appear in appellant’s court on August 4, 2009; (10) a “Notice to Show Cause for Failing to Obey Deferred Disposition Order”; (11) Trevino’s report card from October 15, 2008; (12) Trevino’s “Report card/Progress Summary” for April 14, 2008 to May 30, 2008; (13) Trevino’s “Report Card” for August 25, 2008 through October 3, 2008; (14) an order from appellant’s court ordering Trevino to “pay the entire fine and costs adjudged at the end of this hearing”; (15) a commitment order issued by appellant; (16) a warrant for Trevino’s arrest issued by appellant; and (17) a “Waiver of Alternative Sentencing and Request for Incarceration in Satisfaction of Fine and Costs” signed by Trevino.

Cherry testified that she did not know why Trevino was arrested and that she believed that he did appear on the date he was required to appear. Cherry believed that there was a clerical error on the documents included in State’s Exhibits 7A and 7B. When the prosecutor asked, “So what was he arrested for, then,” Cherry replied, “there was a waiver that he, I guess, declined to do community service or waive any other type of—waive any other type of alternative sentencing.” Cherry agreed with the prosecutor that by signing the waiver, Trevino asserted that “he couldn’t pay the fine, essentially, and so because he couldn’t pay the fine, he had to go to jail, right?” The following exchange then occurred between the prosecutor and Cherry:

Q He appeared on August 4th, 2009, yet, the warrant says failure to attend school, FTA, and the FTA, it is your representation, stands for failure to appear?

A That’s correct, yes.

Q So if you’re saying it was a clerical error and he was obviously incarceration [sic] and arrested by Judge Mary Alice Palacios on August 4, 2009, what was he arrested for, then?

A I would—I don’t know if I can answer that question, but my understanding would be then that he was there for the failure to attend school, but to satisfy the fines and costs of that.

Q Oh, so it’s going back to an offense he committed prior to the age of 17 then? Is that what your testimony is now?

A Right.

....

Q Okay. Now, you are aware, though, that an individual who is 17 cannot be jailed for offenses that happened prior to his 17th birthday, correct?

A Yes, ma’am.

Cherry testified that according to the case manager’s notes regarding Trevino’s case, he was doing well, and it had been recommended that his case be closed in October of 2008 when he completed his probation. Cherry stated that the period of probation in Trevino’s case could only be set for a maximum of six months and that there was no document or order in the record indicating that his probation had been extended. Later, Cherry clarified that the docket sheet indicated that Trevino’s probation had been extended. Cherry agreed with the prosecutor that although the probationary period had ended, the court could reset the cases beyond the six months. Cherry agreed that in Trevino’s case, appellant ordered Trevino to pay the fines, he was unable to do so, Trevino signed a waiver, he was arrested in appellant’s courtroom, and appellant committed him to jail. Cherry testified that the order sent to Trevino to appear in appellant’s court was sent ten months after he completed the terms of his probation.

Cherry explained that the reason there were two cause numbers related to Trevino’s case is because “it’s assigned a juvenile—a juvenile cause number and then an adult cause number.” Cherry agreed with the prosecutor that there was only one judgment in the court’s file and that the only judgment on file indicated a probationary period of six months. When asked if the judgment included a fine, Cherry replied, “No, I didn’t see any.” Cherry agreed that in “November [Trevino was] ordered to pay a fine and court costs.” However, Cherry could not recall if the case sheet or the docket sheet reflected imposition of the fine and court costs.

Cherry stated that “the notice of continuing obligation birthday letter” went out on July 22, 2009 ordering Trevino to appear in appellant’s court on August 4, 2009. Cherry agreed that Trevino appeared on that date. Cherry agreed that appellant signed the warrant for Trevino’s arrest on the “failure to attend school, failure to appear.” Cherry stated she believed that, according to the docket sheet, Trevino appeared every time he was summoned to appear in appellant’s court.

On cross-examination, Cherry testified that Trevino would have been told that he could pay the fine and court costs at a later date, that a payment plan could have been arranged, and that he could perform community service in lieu of paying the fine. Cherry stated that based on Trevino’s signature on the waiver,

he had chosen to go to jail and not pay the fine or perform community supervision. Cherry explained, that although a case manager recommended that Trevino's case be closed, appellant made the final decision whether to close the case. Cherry stated that appellant apparently had not accepted the recommendation because according to the case manager's notes, Trevino had additional absences. Defense counsel asked if Cherry agreed that Trevino was told he had to immediately pay the fine or go to jail, and Cherry disagreed.FN27 Cherry clarified that the language used in the warning that is included in the "birthday letter" or what Cherry referred to as the notice of continuing obligation came "straight out of the [Texas] Code [of Criminal Procedure]."^{FN28}

FN27. Defense counsel's questions appear to be in response to the prosecutor's questions characterizing appellant's actions as demanding immediate payment from Trevino and sending him to jail when he could not pay the fines and court costs.

FN28. A copy of article 45.060 of the Texas Code of Criminal Procedure was admitted at appellant's trial as State's Exhibit 3. See TEX.CODE CRIM. PROC. ANN. art. 45.060.

Cherry testified that most of the forms used in appellant's court were provided by the Justice Training Center, which is the same agency that trains the justices of the peace in Texas. Cherry stated that the other forms that were not provided by the Justice Training Center had been approved by the District Attorney's Office. Cherry testified that Schreiber handled all of the cases in appellant's court where the defendant pleaded "not guilty," which included "failure to attend cases." According to Cherry, Schreiber never expressed that there was a problem with the procedures followed in appellant's court. Cherry testified that she presented the notice of continuing obligation forms to Schreiber before she sent them to the defendants and that Schreiber never expressed a concern with the forms. When asked if any of the forms used in appellant's court were created by "her office," Cherry replied, "Not to my knowledge, no."

On re-direct examination, the prosecutor asked, "[I]sn't it true that Judge Mary Alice Palacios was going to Valley View, Hidalgo and Donna ISD and recruiting truancy work?" Cherry responded, "Recruiting work, I've never seen that, no." Cherry elaborated, "Well, actually, I was approached by the attendance clerk for Valley View when I just started, a few months after I started, and they told me that they had seen an article in the paper for what [appellant] was doing for the [ECISD]."

Cherry agreed with the prosecutor that appellant's staff writes in the information regarding the defendant on the "birthday letter." The prosecutor asked, "You could

actually put my name in there and say I failed to appear, couldn't you? You could put that in the birthday letter if you wanted to? Yes or no?" Cherry said, "No, you can't do that." FN29

FN29. The prosecutor also asked, "Okay. These, essentially—these birthday letter, notice of continuing obligation letters, they are basically weapons that you can use at your disposal, isn't it?" However, after defense counsel objected, the prosecutor stated, "Withdraw the question, Your Honor." The State presented no evidence that appellant used the obligation letters as "weapons" for any purpose.

The prosecutor asked, "So essentially the way that [defense counsel] is insinuating it and the way you are answering his questions, LeRoy Trevino was arrested on a clerical error," and Cherry responded, "No, he was not arrested on a clerical error." Cherry agreed with the prosecutor that the commitment and warrant documented that Trevino was arrested for failure to appear.

The prosecutor asked Cherry to read articles 45.041 and 45.048 of the Texas Code of Criminal Procedure silently. After following the prosecutor's directions, Cherry agreed that "the word community service" did not appear in the articles. On re-cross examination, Cherry explained that the code of criminal procedure did not authorize the imposition of community supervision or an option to pay at a later date but that appellant "wanted to [do] it for them." Cherry agreed with defense counsel that Trevino "said no" to any alter-native sentencing. Cherry stated that the organizations where the "young people" could perform community service included "the Humane Society, the library, Boys and Girls Club. There were so many. The museum. There were so many places that they could perform the hours."

D. Trevino

Trevino testified that he was eighteen years old at the time of appellant's trial. When asked why he was cited for truancy, Trevino said, "I just wasn't going to school." Trevino testified that while he was attending high school in McAllen, he was transferred to alter-native school in Weslaco. According to Trevino, someone from McAllen caused a problem on the bus, and thereafter, no one from McAllen was allowed to ride the van that transported the McAllen students to Weslaco. Trevino stated that he could not find a ride to Weslaco and that is why he was absent.

Trevino testified that appellant told him to pay a fine, and his parents would pay a portion of the fine every time they appeared with him in appellant's court. Trevino did not receive any receipts for payment and did not receive "a piece of paper telling [him] what [he] had to do." Trevino testified that he "always appeared" when he was summoned to appear in appellant's court.

Trevino recalled receiving a letter when he turned seventeen informing him that he “had to go to court and take care of some payment plans that [he] hadn’t taken care of or [he] was going to be arrested.” Trevino stated that he went to court, and he was arrested “[b]ecause he hadn’t finished paying off [his] fines.” Trevino believed that he owed about \$1,000.00 in fines, but he did not have any money at the time. When the prosecutor asked, “Were you offered community service,” Trevino replied, “No, ma’am. My mother was.” The prosecutor asked why Trevino had chosen to go to jail; he responded, “Because it was my behalf, you know what I mean? It was my mistake so I was going to have it.” Trevino stated that he spent “[m]aybe like a week and a half” in county jail after he was arrested.

On cross-examination, Trevino agreed that appellant had placed him on probation and had ordered him to pay a fine. Trevino did not pay the fine, and appellant gave him the option of additional time to pay the fine. He refused that option. Trevino agreed that while he was on probation for his truancy, he had the option of paying the fine in installments but was not able to make those payments.

On re-direct examination, Trevino testified that appellant ordered his mother to serve community service hours and “extended [his] six-month probation to a nine-month.” Trevino claimed that appellant threatened to “lock up” his disabled mother for his truancy and that his mother cried.

E. De Luna

De Luna testified that he was nineteen years old at the time of appellant’s trial. De Luna recalled that when he was in high school at “Johnny Economedes,” he “was missing too much school” and was “told to go to court.” When asked, “And did you go to court,” De Luna said, “Not all the times.” De Luna testified that he went to appellant’s court twice. De Luna recalled that he went to a different court that ordered him to serve probation; he served and successfully finished his probation. De Luna believed that once he completed the probation, he “thought it was over” because that is what his probation officer told him. De Luna testified that he had approximately twenty tickets and that he had “to serve the time” in jail for all of those tickets. De Luna spent eighteen days in jail.

On cross-examination, defense counsel asked, “Okay. And out of the 22 citations, you only went to court on two of them; is that right,” De Luna said, “Yes, sir.” De Luna agreed that he received notices from the judge to appear in court when he received the tickets, but he “just didn’t go.” De Luna testified that his mother wanted to take him to court, but he would not go.

De Luna acknowledged that he had a pending federal lawsuit against appellant, but denied that he was asking for money. De Luna admitted that the \$10,000 or

\$11,000 fine he was ordered to pay was not paid. When defense counsel again asked De Luna if he was seeking money damages in his federal lawsuit against appellant, De Luna said, “Well, money damages.... Yes, sir.”

E. De Luna’s Mother, Elsa De Luna

Elsa testified that De Luna was diagnosed with A.D.H.D. in third grade. She added that De Luna “has had a lot of learning disorders.” Elsa stated that De Luna began getting in trouble for truancy “shortly after his father died.” Elsa testified that she appeared once with De Luna in appellant’s court where he was ordered to pay a fine. Elsa said that they went to appellant’s court two other times, “but she was not there, so they told [her] that they would contact [them] both times, and then after that, they never contacted [them], but, that was, like, years after.”

Elsa testified that De Luna went to juvenile court and received probation with community service, which he completed. Elsa was informed by the juvenile court that De Luna’s case was closed. Elsa stated that subsequently, De Luna was arrested for “PI,” and was told that the bail was \$168.00. Once Elsa obtained the money, she was told that De Luna owed \$10,000 in tickets due to his truancy. Elsa believed that De Luna had already served his probation on those tickets, so she went to speak with appellant. Elsa stated that she spoke with a man at appellant’s court who told her that she had to pay \$10,000 for De Luna’s release. However, Elsa did not have the money, so she asked if she could make payments. Elsa testified that she was told that she had to pay the entire amount before De Luna would be released from jail. Elsa stated that she informed the court that De Luna had already completed his probation for those truancy tickets. When asked to describe appellant’s court’s employees’ attitude, Elsa said, “I believe it was very unprofessional, because I did ask them to please, please—I pleaded with them to please let me make some kind of arrangement to get my son out. I mean, I was devastated. He had never been in jail, and as a mother you don’t know what’s going to go on or happen in there. And they didn’t give me the opportunity.” Elsa was told that her son would have to serve 101 days in jail for the fines.

F. Juvenile Probation Officer, Juan Tijerina

Tijerina testified that he is assigned to “the court unit as a court officer” and is currently assigned to the 430th District Court. Tijerina described the juvenile court as “a court that has jurisdiction over juvenile cases, juveniles that commit crimes within the community and are arrested, those offenses that are committed are submitted to the probation department for review, and those are submitted to the District Attorney’s Office to see if they will file a petition on those cases.” When the prosecutor asked if juvenile cases are handled in the “JP court or a different court,” Tijerina said, “No. They are handled in the—currently it’s the 449th District Court that handles juvenile cases, the 430th District Court and the 332nd.” Tijerina agreed

with the prosecutor that cases can be transferred from the justice of the peace courts to the juvenile court. Tijerina explained that “what happens is that if an order to transfer is signed by a JP judge, it's submitted to the probation department's intake unit, and they assign the case accordingly.” Tijerina stated that once a case is transferred to the juvenile court, it does not to his knowledge get transferred back to the justice of the peace court.

Tijerina agreed with the prosecutor that there were several different orders from appellant's court transferring De Luna's cases to juvenile court included in the court's documents admitted as State's Exhibits 9–5, 9–B, 9–S, 9–T, 9–U, 9–D, 9–C, 9–E, 9–F, 9–G, 9–H, 9–1, 9–J, 9–K, 9–L, 9–M, 9–O, 9–P, 9–Q, and 9–R. Tijerina stated that “[t]o [his] knowledge,” if the justice of the peace court transfers a case to the juvenile court, the juvenile court “retains jurisdiction” and the justice of the peace court loses jurisdiction.

Tijerina stated that De Luna was ordered to serve one year of probation. Tijerina was not aware if De Luna successfully completed probation. However, Tijerina could tell from his file that Veronica Calvillo, the probation officer who was assigned to De Luna's case, “closed out the case.” FN30Tijerina explained that if the child does not “successfully complete [probation], we [the probation officers] usually—it depends. If the child ages out of the—of the system, which is he turns 17 or 18, depending on the term of the probation, we can normally—if—if he—if he commits another offense, then we revoke the probation, but normally if—if everything seems to be well, then we just usually close the case out once he completes probation.” Tijerina said that in the disposition letter, Calvillo documented that De Luna's probation term had expired. Tijerina explained that meant “that the 12-month period ended and usually if there wasn't any kind of subsequent offense, then the case was closed, successfully or not. It—it would depend on what that probation officer.”

FN30. Neither party requested admission of Tijerina's file.

When asked what “does [double jeopardy] mean,” Tijerina replied, “When somebody is charged with a crime the second time around once they've been found true or guilty of the offense.” Tijerina agreed with the prosecutor that regarding all of De Luna's cases, “it would be fair to say that Francisco De Luna paid for those crimes.” When asked, “And so if he was ordered to go to jail on those same crimes, that would be double jeopardy, would it not,” Tijerina responded, “I would think so.”

On cross-examination, Tijerina testified that one of the charges De Luna had in the juvenile court concerned his running away from home and the other charge was for con-tempt of court. Tijerina clarified that “there was

one set of contempts [sic] that were submitted [to the juvenile court], and then there were a second set of contempts [sic] that were submitted June 2007, and then there were another set of contempts [sic] that were submitted October the 4th of 2007.” Tijerina stated that the juvenile court dealt with “[o]ne of the contempts [sic] [which] involved Mr. De Luna having tardies, another con-tempt involved Mr. De Luna having excessive tardies, and another contempt involved him having failure to attend school, another contempt for failure to attend school.” Tijerina continued, “Another contempt for failure to attend school, subsequent failure to attend school, I believe the child having contraband or a weapon, another failure to attend school, a subsequent—this one involves failure to comply, [with] rules and penalties.” Appellant's trial counsel stated, “Now, Mr. Tijerina, contempt is a separate offense from failure to attend school; is that right?” Tijerina replied, “To my understanding” and agreed that contempt and failure to attend school are different crimes. When asked what the State alleged in its petition in the juvenile court that De Luna had done, Tijerina stated that [the petition] included the runaway that occurred on August 20, 2007 and also included in Count Number 2 that Mr. De Luna failed to attend school on September—August the 22nd, 24th of 2006, September 1st, 25th, 20th, 2006; Count 3, failed to attend school October 11th, 7th, 24th, 30th, and 31st of 2006, also; Count 4, November 3rd, 10th, 16th, 29th, 2006; December 13th, 2006; Count 5 included January 8th, 10th, 11th, 17th, of 2007; and Count 6 included February the 5th, 15th, 2007, March 19th, 21st, 26th of 2007.

Tijerina testified that once the justice of the peace court transfers the cases to the juvenile court, the juvenile court alone maintains jurisdiction over those cases. Tijerina stated that as a courtesy, someone from his department sometimes sends a disposition letter to the justice of the peace court indicating that the cases have been disposed. Tijerina testified that such a letter was included in his file regarding De Luna's cases, which was dated January 4, 2008.FN31

FN31. This January 4, 2008 disposition letter was not admitted into evidence, and there is nothing in the record showing that this letter was received by appellant's court. The record includes a disposition letter signed on July 13, 2007 by a probation officer regarding De Luna's case in the juvenile court. However, the offense listed is “Contempt of Court (11 cts).” A second disposition letter signed on January 8, 2008 is also included in the record. However, it lists the offense committed as “cont of court.” No disposition letters regarding De Luna's multiple offenses committed at school for among other things, truancy, appear in the record.

During re-direct examination, Tijerina testified that the probation department notified appellant of “the action

that was taken in the juvenile court” regarding De Luna’s probation. Tijerina stated that State’s Exhibit 9X, a document entitled “Disposition” from the Hidalgo County Juvenile Center and signed by a juvenile probation officer, was sent to appellant’s court as a courtesy and “a way to inform the referring agency of what action was taken in the case.” When asked “what was the action taken in this case,” Tijerina said, “In this particular one, I believe that the probation officer marked off—or wrote in, Family did not respond for services.” Tijerina stated that the disposition letter did not transfer the cases back to appellant’s court and that the form indicated that the case was not closed. However, Tijerina did not explain what the notation “[The] Family did not respond for services” meant. The trial court also admitted into evidence State’s Exhibit 12, which is another “disposition letter” sent to appellant’s court. State’s Exhibit 12 documents that the juvenile court took action in De Luna’s case and that he was “placed on Judicial Probation” on January 24, 2008 for “cont of court.” Tijerina agreed with the prosecutor that based on the disposition letter, appellant should have “had knowledge” that the juvenile court had placed De Luna on probation. However, Tijerina did not acknowledge that the probation was for contempt of court.

On re-cross examination, when appellant’s defense attorney asked if De Luna pleaded guilty to contempt of court, Tijerina responded, “Correct.” The disposition letter states that De Luna had been placed on “judicial probation” for the offense of contempt of court based on a referral received from appellant’s court. It does not state that De Luna was punished for any other violations, which included the excessive absences and other Class C misdemeanor offenses. Although Tijerina referred to his file during his testimony, that file was not admitted into evidence.

G. Probation Intake Supervisor, Rafael Ocon
Ocon, a probation intake supervisor with the Hidalgo County Juvenile Probation Department, testified that he had reviewed the files from appellant’s court in De Luna’s case. Ocon observed that the file includes “orders to transfer, failure to attend” that indicated that appellant had transferred De Luna’s cases on those Class C misdemeanor charges from her court to the juvenile court. Ocon stated that once appellant signed the transfer orders, “[s]he loses jurisdiction of those cases” and the juvenile court and the juvenile probation department “retain” jurisdiction. Ocon agreed with the prosecutor that appellant transferred all of De Luna’s cases to the juvenile court and lost jurisdiction over the cases. According to Ocon, the judgment reflected that the probation department filed the cases against De Luna as “truancies.” FN32 Ocon explained that a truancy is the same charge as a failure to attend school charge. Ocon testified that De Luna was placed on probation for a year, ordered to perform fifty hours of community service, and that De Luna

completed those conditions. Ocon agreed that De Luna “completed the probation.” FN33

FN32. This judgment is not in the record. Thus, although Ocon testified that it “reflected” that the probation department filed the cases against De Luna as “truancies,” there is nothing in the record showing that the juvenile court disposed of those “truancies.” Moreover, there were other charges against De Luna pending that were not “truancies,” and Ocon did not testify as to what occurred in those cases against De Luna.

FN33. As stated above, the only documents from the juvenile court are the disposition letters that show that the juvenile court had disposed of contempt of court charges against De Luna. There is no evidence that the juvenile court ever disposed of the Class C misdemeanor charges against De Luna. Thus, although Ocon testified that the judgment reflected that the probation department filed its case against De Luna as “truancies,” there is nothing in the record showing that the juvenile court disposed of any truancy charges.

H. Closing and the Verdict

The State rested, and defense counsel requested an instructed verdict on the basis that “there is no evidence at all or insufficient evidence as a matter of law from which the jury or any fact finder could find all of the elements beyond a reasonable doubt” because “[t]here is no evidence from any source” that appellant: (1) ‘intentionally with intent as defined by the—by this Penal Code subjected’ the alleged victims to arrest”; or (2) “knew that any acts that she understood or she did were unlawful.” The State responded that the evidence showed “that each of the warrants that were signed on each of the individuals, warrants for their arrest” by appellant and that appellant “intentionally subjected each of those individuals to arrest by signing the warrants.” The prosecutor said, “When she signed those warrants, she intended—it was her conscious objective to arrest these particular individuals.” The prosecutor argued that “the law is imputed to [appellant] to know the law, and “[s]he signed 22 orders transferring [De Luna’s cases]. She knew the law of transfer. She lost jurisdiction in that case.” Finally, the prosecutor argued that appellant “knew by sending that [letter of continuing obligation to Trevino]—it’s her position she should have never sent that letter out. She still sent it out. And she—he came in on the designated time and place on that letter, and she still arrested him for failure to appear. That was clear. The arrest warrants and commitment letters all reflects failure to appear because it’s through testimony that FTA stands for failure to appear.” The trial court denied defense counsel’s request for a directed verdict.

In closing argument, the State prosecutor stated, in pertinent part, the following:

I'm just going to read one of the counts to you, but basically says if you find from the evidence beyond a reasonable doubt that on or about—and then there is a different date for each victim in the—in the case—in Hidalgo County, Texas, had proof that these offenses happened in Hidalgo County, Texas, then Mary Alice Palacios, who we've had pointed out to you numerous times by most of the witnesses that came to testify, that she did intentionally subject each of the victims, [Trevino and De Luna] to an arrest—all she had to do was have them arrested—and that she knew her conduct was unlawful. Then you'll find—and that she was acting under the color of her title—color of her title of her public office, in other words, if she was acting as judge when she did these things, then you'll find her guilty.

One other thing I want to point out to you. Most of the charge is self-explanatory, but it is not required that the prosecution prove guilt beyond all possible doubt. All we have to do is prove to you beyond a reasonable doubt....

Now, you want to look at the circumstances surrounding each of these arrests to try to determine the intent and the knowledge in each one of these cases.

Now, Mary Alice Palacios, Judge Palacios, has been a judge for quite a few years. We know that she's gone to training. The first year she was elected judge, she—now, these are required trainings. In addition to the required trainings, she can voluntarily go to more training, but she's required the first year to take 80 hours of training. Each year thereafter she has to take 20 hours of training. And—and throughout—which was done in each case.

Now, how would you know a person intended to do wrong? Okay. She signed a warrant on [Trevino's] case. He comes to court. He appears as directed by the judge. And he shows up in court. She signs a warrant, failure to appear. It's very obvious from all the testimony he did not fail to appear. She intentionally signed the warrant. She intention-ally had him arrested. She knew he didn't fail to appear. He did appear. So she obviously intended her conduct, and she knew that conduct was wrong.

Now, when you look at these warrants—and I'll get a couple of them to show you. In State's Exhibits—in State's Exhibit 9—B—we'll take that one first. You'll have a warrant. But we also brought the sheriff's records, their warrants, copies of warrants, so you can compare if you care to. But it says, Violation: Failure to Attend School, FTA. Well, you could interpret that FTA to mean

failure to attend school; however, you've heard a lot of testimony that FTA in parenthesis means failure to appear.

And I think one way that we can clear that up is if you'll take a look, especially in De Luna's cases, his warrant in 9—A is a different warrant. It says Violation, Failure to Comply with Directive. Then in parenthesis is FTA, Failure to Appear. So we know these arrests were for failure to appear.

Francisco—I mean [Trevino] clearly could not have been arrested for failure to appear when he appeared. I mean, that's obvious, very obvious. There is no two ways you can interpret that. If you don't appear, you've been summoned to appear, you don't appear, then you—then you can take a failure to appear warrant. And if you do appear, they can't take a failure to appear warrant. It's very, very obvious.

Now, secondly, we come to [De Luna]. He had numerous cases, many, many, many cases. And all these cases were transferred by the Court to the juvenile court. [FN34] And you've heard testimony. Go back and read this order of transfer. What does it say? It says, on the Court's own motion, we transfer [De Luna's] case to the juvenile court. Remember, she is the JP court. She moved these cases from her court to the juvenile court. She moved all of them to the court, all but one. She lost jurisdiction of those cases.

FN34. The State concedes that appellant had not transferred one of De Luna's cases before she issued an arrest warrant.

And she has attached to each one of these exhibits—I'm not going to go through each one with you. She has attached to these exhibits the order transferring the case. And if you will look through these exhibits, there is no order transferring the case back to the Court. She transferred this particular case I'm looking at on the 8th day of March of 2007.

The next thing she does is on December 17th of 2008. That's a year and about three-quarters, a year and eight or nine months later. A year and eight or nine months later, she sends out what they refer to as the birthday letter or the notice of continuing obligation on all these cases. You count these, these JP numbers up here, one, two, three, four, five, [and] six. It comes up to, like, 22 or 23 cases that she transferred—I mean that she is noticing him to appear in court on; however, when you look at the file, there is no order transferring these cases back, none whatsoever. It's very obvious she did not have jurisdiction in this case.

Yet she also gets a letter from the probation department, which I'd like to remind you of. She got a letter from the probation department telling her, in all these cases you've transferred to our court, we have put [De Luna] on probation.[FN35] She had notice of that.

FN35. The letter does not state that De Luna was placed on probation in all of the cases that appellant transferred to the juvenile court. The form letter filled in by a juvenile probation officer has one cause number which is J-07702. The only offense listed is contempt of court. We have reviewed all of the charges that were transferred to the juvenile court by appellant. De Luna was not accused of contempt of court in any of those transferred cases. The State presented no evidence linking the contempt of court charge with those transferred cases. See TEX.CODE OF CRIM. PROC. ANN. art. 45.050 (West, Westlaw through 2013 3d C.S.) (establishing that a justice court may, among other things, "refer the child to the appropriate juvenile court for delinquent conduct [or] for contempt of the justice or municipal court order" if that child has failed "to obey an order of a justice or municipal court under circumstances that would constitute contempt of court"). Without an explanation of the procedures that are followed and how and when a justice court loses jurisdiction, it is very difficult to determine whether appellant's court had jurisdiction in this case.

But in spite of all that, he took out all his warrants for failure to appear. And then if you'll look at these warrants carefully, it's a command to any peace officer that if they come across [De Luna] to arrest him. So when [De Luna] was arrested for a public intoxication charge, the sheriff's office had all these warrants on file, so they arrested him for all these.[FN36] Clearly wrong, clearly wrong. Anybody would know it's wrong.

FN36. As explained further below, the State presented no evidence that the sheriff's office arrested De Luna again after he was arrested for either public intoxication or possession of marihuana.

It's double jeopardy. That's a very basic fundamental right that we all have. Everybody knows about double jeopardy. It's not something that you would make a mistake on. You know it's wrong. You can't punish a person twice. You can't try a person twice for the same offense. If you have a murderer—if we try a murderer, as a prosecutor, if I lose that case, it's over. We don't get another shot at him. It's over. If we try him for murder and we don't like the punishment, whatever he gets, it's over. We can't go back and assess some more punishment. It's over. We can only punish him once for the offense. It's a very basic, very fundamental right that was violated by this Judge.[FN37]

FN37. In her brief, appellant argues that one of the State's theories was that she lost jurisdiction over Trevino's cases by the time she issued the warrants for his arrest. However, after reviewing the State's opening and closing argument and the evidence, we disagree that the State offered this theory as to Trevino to the jury.

The jury convicted appellant of official oppression of Trevino and De Luna. Appellant filed a motion for new trial, and after a hearing, the trial court denied the motion. This appeal followed.

Held: Judgment of Acquittal

Opinion: As previously held, a judge is not subject to criminal liability when it is proven that the court she presides over does not have jurisdiction or if that judge commits a double jeopardy violation. Nonetheless, as explained below, we have also determined that the evidence is insufficient to support any of the State's theories.

Specifically, appellant, by her first, second, and third issues, argues that the evidence was insufficient to show that she knew that her acts were unlawful and that the State did not provide any evidence that she was not justified when she signed the complained-of warrants. The State claims that the fact finder in this case could have inferred from the evidence that appellant knew that her court lacked the requisite jurisdiction in De Luna's case and that in Trevino's case, even a lay person knows that one cannot arrest a person for failure to appear when the person did in fact appear.

We agree with appellant. All of the alleged acts involve appellant's discharge of official duties and her judicial interpretation of the applicable law. If appellant signed the warrant for Trevino's arrest for a crime he did not commit, the State was still required to prove that appellant intended to subject Trevino to an arrest that she knew was unlawful.FN38

FN38. Although, the State alluded to a civil lawsuit against appellant, it did not provide any evidence that appellant committed a tort when she issued the complained-of warrants. Moreover, the State did not allege at trial and has not alleged on appeal that appellant committed any torts when she signed the warrants.

A. Trevino

In our sufficiency review, we must review all of the evidence presented in order to determine whether the jury's finding of guilt is a rational finding. See Brooks, 323 S.W.3d at 907 (explaining that although a jury may believe one witness and disregard some of the evidence, "based on all the evidence" the jury's finding of guilt must be rational). There-fore, we will set out all

of the evidence below and explain how that evidence is insufficient under the State's theories.

1. The "FTA" Notation

At appellant's trial, the State relied on evidence that Trevino's arrest warrants had the notation "FTA." The State argued this meant that Trevino was arrested for failure to appear, and it was undisputed that Trevino always appeared in appellant's court when summoned.

The evidence presented at trial showed that Trevino owed court imposed fines in two cases for failure to attend school. The evidence shows that when Trevino appeared in appellant's courtroom on the day that appellant signed the arrest warrant (August 4, 2009), he signed a waiver indicating that he would serve a sentence in jail in lieu of paying the fines that he had been ordered to pay for two counts of failure to attend school.FN39

FN39. Although not presented to the jury, article 45.046 of the Texas Code of Criminal Procedure states the following:

(a) When a judgment and sentence have been entered against a defendant and the defendant defaults in the discharge of the judgment, the judge may order the defendant confined in jail until discharged by law if the judge at a hearing makes a written determination that:
(1) the defendant is not indigent and has failed to make a good faith effort to discharge the fine and costs; or
(2) the defendant is indigent and:
(A) has failed to make a good faith effort to discharge the fines and costs under Article 45.049; and
(B) could have discharged the fines and costs under Article 45.049 without experiencing any undue hardship.
TEX.CODE CRIM. PROC. art. 45.046 (West, Westlaw through 2013 3d C.S.).

The docket sheets from appellant's court show that appellant ordered Trevino to pay fines in two causes by August 4, 2009.FN40In addition, Trevino acknowledged that appellant had ordered him to pay fines and that he had not done so. Trevino testified that he believed he owed about \$1,000.00 in fines. Trevino also agreed that, although appellant had offered to give him more time to pay the fines, he refused her offer. The State presented no evidence that Trevino did not owe the fines and court costs or that appellant committed any improper acts in allowing Trevino to waive payment of his fines and go to jail. More-over, when the prosecutor asked why he was arrested, Trevino replied, "Because I hadn't finished paying off my fines."FN41Trevino explained that he chose to go to jail instead of paying his fines or his mother doing community service "[b]ecause it was my behalf, you know what I mean? It

was my mistake so I was going to have it." Trevino never stated that he had been arrested for failing to appear in appellant's court.

FN40. The record also contains an order showing that appellant conducted a hearing before she ordered Trevino to pay the fines.

FN41. Trevino stated that appellant's court's secretary told him that "there were \$500 that were missing." Trevino said, "I remember specifically because my dad was asking for 200. Only 3 and I told him that was too much money just to get me in there so I'd take the time instead." The prosecutor asked, "And how much total did you owe?" Trevino responded, "I think it was around-I think maybe 1,000 and a half, like almost 2,000."

State's Exhibit 7A and 7B include a "Waiver of Alternative Sentencing and Request for Incarceration in Satisfaction of Fine and Costs" signed by Trevino on August 4, 2009 under two separate cause numbers in appellant's court. Each waiver states:

The Court has explained to me my right to be released to pay the fine(s) and court costs at some later date in the manner prescribed in Art. 45.041, C.A.C.C.P.[FN42] I understand that I have such a right and I do hereby expressly waive this right in the above-styled case and request that I be imprisoned in jail for a sufficient length of time to discharge the full amount of fine(s) and costs adjudge [sic] against me as provided by Art. 45.048. [FN43]

FN42.Article 45.041 states, in relevant part, the following: Judgment

(a) The judgment and sentence, in case of conviction in a criminal action before a justice of the peace or municipal court judge, shall be that the defendant pay the amount of the fine and costs to the state.
(b) Subject to Subsection (b-2), the justice or judge may direct the defendant:
(1) to pay:
(A) the entire fine and costs when sentence is pronounced;
(B) the entire fine and costs at some later date; or
(C) a specified portion of the fine and costs at designated intervals;

(b-2) When imposing a fine and costs, if the justice or judge determines that the defendant is unable to immediately pay the fine and costs, the justice or judge shall allow the defendant to pay the fine and costs in specified portions at designated intervals.
(c) The justice or judge shall credit the defendant for time served in jail as pro-vided by Article 42.03. The credit shall be applied to the amount of

the fine and costs at the rate provided by Article 45.048.
TEX.CODE CRIM. PROC. ANN. art. 45.041 (West, Westlaw through 2013 3d C.S.).

FN43. Article 45.048 states:

Discharged from Jail[]

(a) A defendant placed in jail on account of failure to pay the fine and costs shall be discharged on habeas corpus by showing that the defendant:
(1) is too poor to pay the fine and costs; or
(2) has remained in jail a sufficient length of time to satisfy the fine and costs, at the rate of not less than \$50 for each period of time served, as specified by the convicting court in the judgment in the case.
(b) A convicting court may specify a period of time that is not less than eight hours or more than 24 hours as the period for which a defendant who fails to pay the fines and costs in the case must remain in jail to satisfy \$ 50 of the fine and costs.

Id. art. 45.048 (West, Westlaw through 2013 3d C.S.).
The jury was not provided with copies of articles 45.041 and 45.048.

Each warrant issued by appellant states:

*To any Peace Officer of the State of Texas,
Greeting: You are hereby Commanded to arrest Trevino, Lee Roy if be found in your County and bring Him/Her before me, a Justice of the Peace in and for Precinct No. 4, Place 2, of Hidalgo County, Texas at my office at 222 N. 12th Ave., Tx., in said County Immediately, then and there to answer the State of Texas for an offense against the laws of said State, to-wit:.... Fine \$537 ... Name of Complainant: JJAEP ... Herein Fail not, but of this writ make due return, showing how You have executed the same. Violation: 1. Failure to Attend School (FTA).*

Each commitment order states:

The State of Texas, to the Sheriff or any Constable of Hidalgo County, Greeting: ... YOU ARE HEREBY COMMANDED to commit to the jail of Hidalgo County, Texas the body of [Trevino] ... Who has been convicted in this court of the offense of Fail to Attend School (FTA)....

The said defendant to be released upon remaining in custody for the time required by law to satisfy the amount of such fine and cost, or upon such fine and costs being re-mitted by the proper authority, or upon the full payment of fine and cost, the amount of which is now due is \$537.

The warrants set out that appellant ordered the arrest of Trevino "for an offense against the laws of said State, to wit" a "Fine \$537" and that the complainant was the "JJAEP" for the violation of "Failure to Attend School (FTA)." FN44 The violation noted on the warrant is for "Failure to Attend School (FTA)" on the basis of a complaint filed by Trevino's school, "JJAEP." The failure to attend school complaint was filed on March 7, 2008, and the offense date documented on the warrant was March 7, 2008. FN45 Thus, the warrant clearly documents that Trevino's offense occurred on March 7, 2008 and was based on a complaint filed in appellant's court by his school. FN46 The warrant does not state that appellant's court is the complainant. FN47

FN44. "JJAEP" is the alternative school that Trevino attended.

FN45. If Trevino had been arrested for failure to appear, the warrant should have listed the date of the offense for that charge and the complainant would have been appellant's court. Moreover, the date on the warrant would not have been March 7, 2008, and the complainant would not have been Trevino's school.

FN46. The record contains copies of the complaints filed in appellant's court by Trevino's school.

FN47. Therefore, we interpret the warrants as documenting that appellant ordered Trevino's arrest because he had not paid the fines for two separate failure-to-attend-school offenses. We emphasize that we respectfully disagree with the State's interpretation of the warrants.

In summary, Trevino signed the waiver on August 4, 2009, and appellant signed the arrest warrants and commitment orders on August 4, 2009. The waivers state that appellant had explained to Trevino that he had a right to be released to pay the fines and court costs at some later date in the manner prescribed in article 45.041. FN48 Thus, because Trevino signed the waiver to spend time in jail in lieu of paying the fines, no rational jury could have inferred that the "FTA" notation on the arrest warrants proved beyond a reasonable doubt that appellant issued the warrants to arrest Trevino for failure to appear. Accordingly, there is no evidence that appellant knew that arresting Trevino was "unlawful" for the reasons claimed by the State.

FN48. The deferred adjudication judgment signed by appellant in one of Trevino's cases, states that Trevino was charged with the offense of "FTA School" committed on March 7, 2008. It defies logic to suggest that appellant meant that Trevino was charged with the offense of "failure to appear in court school."

The commitment orders signed by appellant committing Trevino to the jail were filed in the Hidalgo County Sheriff's Office ("HCSO") by the custodian of

records. In those commitment orders, the “Officer’s Return” has been completed and documents that the commitment orders were executed on August 4, 2009 at 12:00 p.m. However, the HCSO File does not contain any arrest warrants for Trevino. Thus, there is nothing in the record showing that the arrest warrants with the “FTA” notation were actually served on Trevino. Trevino was placed in confinement on August 4, 2009, thus, at some point perhaps he was arrested. However, the evidence undisputedly shows that if Trevino was in fact arrested, he was arrested after signing the waivers. And there is no evidence in the record that the HCSO ever executed the warrants with the erroneous “FTA” notation. See id. art. 15.22 (West, Westlaw through 3d C.S.) (“A person is arrested when he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person arresting without a warrant.”). Although we cannot discern from the record under which authority Trevino may have been arrested, it was the State’s burden to prove beyond a reasonable doubt that Trevino’s arrest was unlawful due to these allegedly erroneous warrants. Finally, the docket sheets from appellant’s court in Trevino’s cases state that on August 4, 2009, Trevino’s cases were closed due to “Time served.” If Trevino had in fact been arrested for failure to appear, Trevino’s unpaid fines would have still been pending in appellant’s court, and Trevino’s cases would not have been closed.

Here, viewing the evidence in the light most favorable to the jury’s verdict, we conclude that based on all of the evidence presented, no rational juror could have found beyond a reasonable doubt that appellant ordered Trevino’s arrest for failure to appear. Moreover, because Trevino signed the waiver, the evidence presented in this case does not support a finding that appellant’s act in signing the arrest warrant with the “FTA” notation was in any way unlawful.

2. Article 45.060

The State also attempted to invoke article 45.060 as proving that appellant was precluded from having Trevino arrested for offenses he committed before the age of seven-teen. Article 45.060 is entitled, “Unadjudicated Children, Now Adults; Notice on Reaching Age of Majority; Offense,” and it states, in relevant part, “Except as provided by Articles 45.058 and 45.059, an individual may not be taken into secured custody for offenses alleged to have occurred before the individual’s 17th birthday.” However, the State did not provide any evidence regarding the meaning of the term “secured custody.” And, it is well established that individuals under the age of seventeen can be arrested under certain circumstances. See *Lanes v. State*, 767 S.W.2d 789 (Tex.Crim.App.1989) (establishing that a juvenile may be arrested if probable cause exists). Because there is no evidence regarding the meaning of “secured custody” as used in article 45.060, no rational jury could have found beyond a

reasonable doubt that article 45.060 prohibits the arrest of an individual for offenses committed before the age of seventeen. Moreover, article 45.045 allows a justice of the peace to issue a *capias pro fine* for person who committed an offense before the age of seventeen if the individual is seventeen years of age or older, and “the court finds that the issuance of the *capias pro fine* is justified after considering” (1) “the sophistication and maturity of the individual;” (2) “the criminal record and history of the individual;” and (3) “the reasonable likelihood of bringing about the discharge of the judgment through the use of procedures and services currently available to the court;” and “the court has proceeded under Article 45.050 to compel the individual to discharge the judgment.” FN49TEX.CODE CRIM. PROC. art. 45.045. Article 45.045 further states, that “(a) If the defendant is not in custody when the judgment is rendered or if the defendant fails to satisfy the judgment according to its terms, the court may order a *capias pro fine* issued for the defendant’s arrest.” Id. (Emphasis added).

FN49. The State provided no evidence that appellant did not comply with article 45.045 when she issued the *pro capias fine* for Trevino.

Nonetheless, even assuming without deciding, that the State showed that pursuant to article 45.060, appellant’s placing Trevino in “secured custody” for his failure to pay the fines and court costs was improper, the State did not provide any evidence that appellant’s act was criminal, tortious, or both. At best, the State showed that appellant misinterpreted the applicable law. The State cites no authority, and we find none, providing that a judge’s misinterpretation of a statute amounts to a crime or tort. Therefore, the State failed to prove that appellant’s act, even if true, was unlawful. See TEX. PENAL CODE ANN. § 1.07(a)(48) (defining unlawful as criminal or tortious without a justification or privilege).

3. Knowledge and Justification

Finally, the evidence fails to support a finding that appellant did not reasonably believe that her conduct was required or authorized by law when she signed the warrants for Trevino’s arrest. See TEX. PENAL CODE ANN. § 9.21(a). The “FTA” notation is no more than a mere modicum of evidence, and as previously stated, no rational jury could have reasonably inferred that the “FTA” notation proved beyond a reasonable doubt that appellant had Trevino arrested for failing to appear in her court. FN50 Instead, the evidence undisputedly shows that Trevino signed a waiver and chose to serve a jail sentence in lieu of paying his fines. FN51 Thus, the evidence does not support a conclusion that appellant knew that she lacked authority to sign the arrest warrants for Trevino, despite any documentation or testimony that he was arrested for “failure to appear.” FN52 Accordingly, we conclude that the evidence was insufficient to prove beyond a reasonable doubt that

appellant committed the offense of official oppression under these facts.

FN50. As Judge Cochran's concurring opinion in *Brooks* emphasized, the mere existence of some evidence is not sufficient in criminal cases—there must be sufficient evidence for a rational juror to reach a conclusion beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 917 (Cochran, J., concurring). Legal sufficiency is judged not by the quantity of evidence, but by the quality of the evidence and the level of certainty it engenders in the fact finder's mind. *Id.* at 918. In *Brooks*, the Texas Court of Criminal Appeals provided the following analogy:

The store clerk at trial identifies A as the robber. A properly authenticated surveillance videotape of the event clearly shows that B committed the robbery. But, the jury convicts A. It was within the jury's prerogative to believe the convenience store clerk and disregard the video. But based on all the evidence the jury's finding of guilt is not a rational finding. *Brooks*, 323 S.W.3d at 907 (quoting *Johnson v. State*, 23 S.W.3d 1, 15 (Tex.Crim.App.2000) (McCormick, P.J., dissenting)).

As the example in *Brooks* shows, the jury in this case was free to disregard the undisputed evidence that appellant had Trevino arrested because he signed a waiver in lieu of paying the fines he agreed to pay. However, the jury was not free to infer from the “FTA” notation alone that appellant knew that Trevino always appeared in her court but had him arrested for failure to appear anyway because Trevino admitted that he was arrested pursuant to his signed waiver. See *id.*

FN51. The State did not present any evidence that appellant was not authorized to allow Trevino to sign the waiver and chose to serve a jail sentence instead of paying his fines. In addition, under articles 45.046, 45.045, and 45.048 state otherwise.

FN52. We note that if appellant believed that Trevino had failed to appear in her court, the evidence still had to establish that she knew that her acts were “unlawful.” Although such a mistake cannot be condoned, and we disapprove of such error, mistakes are nonetheless made by trial judges in criminal matters, and we cannot conclude that such mistakes amount to criminal or tortious behavior. Under this record, no evidence was presented that appellant knew that Trevino always appeared in her court and that despite this knowledge, she still had him arrested for failure to appear. In addition, as previously stated, we respectfully disagree with the State's contention that appellant had Trevino arrested for failure to appear.

C. De Luna

Regarding De Luna, the State claimed that appellant's court lacked jurisdiction to issue the warrants for De Luna's arrest and that she allegedly violated double

jeopardy principles by punishing De Luna for crimes that he had already been punished for committing by the juvenile court. The State's theory was that once appellant transferred De Luna's cases to the juvenile court, her court lost jurisdiction to perform any acts in De Luna's cases. And once De Luna served his sentence in the juvenile court, he had already been punished for the offenses that appellant had transferred.

In order to convict appellant under the State's theory, the jury had to determine whether appellant's court had jurisdiction over De Luna's cases and whether De Luna had already been punished by the juvenile court for the offenses that he was allegedly arrested for committing. FN53 The State cites no authority, and we find none, which allows a fact finder to determine whether a trial court lacked jurisdiction to perform a certain act or to determine whether a judge's order violates double jeopardy. FN54 The usual procedure in these matters is for the defendant to appeal the case to a higher court or to seek relief by filing a writ of habeas corpus. FN55

FN53. A defendant is subjected to double jeopardy when he receives multiple punishments for the same offense. *Cervantes v. State*, 815 S.W.2d 569, 572 (Tex.Crim.App.1991) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

FN54. Even a Justice of the United States Supreme Court opined that the Supreme Court's cases “in this area indicate, [that] the meaning of the Double Jeopardy Clause is not always readily apparent.” *Tibbs v. Fla.*, 457 U.S. 31, 47 (U.S.1982) (J. White, dissent).

FN55. We note that the jury was never informed that appellate courts have reversed trial courts on the basis that the arrest of the defendant was invalid because the warrants issued were improper and on the basis that the trial court's conviction violated the prohibition of double jeopardy. See *Littrell v. State*, 271 S.W.3d 273, 275 (Tex.Crim.App.2008) (holding that appellant was subjected to double jeopardy and reversing court of appeals decision finding that there was no double jeopardy violation).

By presenting the issue of whether appellant's court lacked jurisdiction to the jury, the trial court judge in appellant's case agreed that jurisdiction may be determined from the testimony of lay witnesses as a factual issue. We find no authority, and the State cites none, supporting a conclusion that the issue of whether a court has jurisdiction can be determined by lay witness testimony or that a fact finder may determine jurisdiction by either believing or disbelieving the witnesses. Instead, whether a court has jurisdiction is determined as a matter of law. See *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226, 228 (Tex.2004) (determining whether a court has subject matter jurisdiction is question of law that is reviewed de novo by an appellate court); *Tex. Natural Res.*

Conservation Comm'n v. IT–Davy, 74 S.W.3d 849, 855 (Tex.2002); Robinson v. Neeley, 192 S.W.3d 904, 907 (Tex.App.-Dallas 2006, no pet.). To determine as a matter of law whether a court has jurisdiction, we review the Texas Constitution or applicable statutes granting the court its jurisdiction. See Gallagher v. State, 690 S.W.2d 587, 593 (Tex.Crim.App.1985) (“Where jurisdiction is given by the Constitution over cases involving designated kinds of subject matters, the grant is exclusive, unless a contrary intent is shown by the context. Further, it has been stated that the jurisdiction of the district court is fixed by the state Constitution and is immutable except by constitutional method of amendment”); Simpson v. State, 137 S.W.2d 1035, 1037 (1940) (determining whether a district court lacked jurisdiction to try a police officer for official misconduct by construing the Texas Constitution); Hall v. State, 736 S.W.2d 818 (Tex.App.-Houston [14th Dist.] 1987, pet. ref'd) (analyzing jurisdiction of a district court by reviewing the articles of the Texas Code of Criminal Procedure); State v. Hall, 829 S.W.2d 184, 188 (Tex.Crim.App.1992) (reviewing whether the lower court lacked jurisdiction by analyzing both the Texas Code of Criminal Procedure and the Texas Constitution).

In this case, the State failed to present to the jury the statute conferring jurisdiction to the justice courts or the statute conferring jurisdiction to the juvenile courts. The State made no effort to show that as a matter of law, appellant's court lacked jurisdiction when she issued the complained-of warrants to arrest De Luna. The State further failed to recognize that appellant's acts were done in the administration of her court's docket and that, as the judge, appellant had a duty to make those administrative decisions and to interpret the law. Instead, the State presented testimony from lay witnesses who stated that it was their understanding and belief that once appellant transferred the cases to the juvenile court, the justice court lost jurisdiction completely. We have reviewed the records from appellant's court and the disposition letters sent by the juvenile court. The documents signed by appellant transferring the cases to the juvenile court do not mention any con-tempt-of-court charges against De Luna. However, it is undisputed and the evidence shows that the juvenile court disposed of several contempt of court charges filed by appellant's court against De Luna and that De Luna served probation on those charges.

The evidence the State presented regarding De Luna's case was not clearly explained. For example, the State presented no evidence regarding what punishment, if any, De Luna received in the Class C misdemeanor charges. Also, there is no evidence that the juvenile court disposed of the twenty-two Class C misdemeanor charges or that the State dismissed those charges. The State also failed to provide any law on this issue. Thus, the State did not fully explain the procedure a justice

court follows when the juvenile court does not dispose of class C misdemeanor offenses that have initially been transferred to the justice court but not disposed of by that court. It appears that more information was necessary to determine whether appellant's court lost jurisdiction overall of De Luna's cases. Moreover, the State did not offer into evidence the entire file from the juvenile court regarding De Luna's cases. Finally, appellant did not transfer one of De Luna's cases to the juvenile court, and the State failed to explain the impact of that decision. It was the State's burden to show that appellant's acts were unlawful, and it insisted on proving that her court's alleged lack of jurisdiction made her acts unlawful. Therefore, the State had the burden of providing the necessary information to the jury.

Also, there are questions regarding a “disposition letter” sent by the probation department to appellant's court stating that the “family had refused services” in one of the cases she transferred to the juvenile court. The State presented no evidence regarding how a family can refuse services when a child has been accused of a misdemeanor offense. When asked, Cherry, a former case manager in appellant's court, stated that the letter “would be something we would get back from juvenile probation as to whether or not they were going to pursue the matter or not.” Cherry then testified that her interpretation of this letter was that the juvenile court did not have jurisdiction over that particular case. Thus, although a probation officer testified that the disposition letter did not transfer jurisdiction back to appellant's court, a legal conclusion that the officer was not qualified to make or for which the jury was not entitled to pass judgment upon, the only evidence before the jury shows that appellant's court personnel believed that the letter did in fact transfer jurisdiction back to her court. Thus, even if the State proved that Cherry was mistaken, the State did not prove that appellant knew that Cherry was mistaken. In other words, the evidence before the jury only supports a finding that appellant did not interpret the disposition letter in the same way that the probation officer interpreted it. Therefore, the evidence does not support a finding that appellant knew that her court lacked jurisdiction and that her acts were as the State alleged “unlawful.”

The difficulty in determining the legal sufficiency of the evidence under our standard of review is readily apparent because the offenses, as alleged by the State turn on a determination of questions of law.^{FN56} This includes a determination of whether a defendant's double jeopardy rights have been violated. Nonetheless, we will address the sufficiency of the evidence to the extent that we find that it is possible.

FN56. We do not usually apply sufficiency of the evidence review when determining questions of law.

The evidence presented showed that De Luna had twenty-two Class C misdemeanor charges pending in appellant's court. De Luna committed those offenses at school. The record contains multiple transfer orders signed by appellant, transferring De Luna's cases to the juvenile court. The evidence further showed that appellant did not transfer one of De Luna's cases to the juvenile court. However, the evidence presented undisputedly shows that the juvenile court placed De Luna on probation only for contempt-of-court offenses. There is nothing in the record showing that the juvenile court made any ruling on the Class C misdemeanor cases or otherwise disposed of them.

Next, it was undisputed at trial that De Luna was not initially arrested pursuant to the warrants issued by appellant and that he was instead arrested for either public intoxication or possession of marihuana. In fact, the State conceded at trial that De Luna was originally arrested for public intoxication. The prosecutor stated in closing argument the following: "So when [De Luna] was arrested for a public intoxication charge, the sheriff's office had all these warrants on file, so they arrested him for all these. Clearly wrong, clearly wrong. Anybody would know it's wrong."FN57It was further undisputed that the reason that De Luna was not released from jail when his mother went to post his bail after he was arrested for public intoxication was due to De Luna's failure to pay the fines he had not paid in appellant's court.FN58However, there is no evidence in the record that if appellant's court had jurisdiction, she was not allowed to issue the *capias pro fine* warrants for De Luna's arrest.FN59The entirety of the State's case rests on whether appellant subjected De Luna to an unlawful arrest because her court lacked jurisdiction and she somehow violated his right against double jeopardy.

FN57. We note that the State presented no evidence of the proper procedures that occur in a case where a person is arrested and then it is discovered that the person has warrants for his arrest. First of all, it is unknown what agency arrested De Luna for the public intoxication charge. Also, as further explained below, there was no evidence presented that the Sheriff's Office ever executed these warrants.

FN58. The commitment orders do not appear in the record. However, at appellant's motion for new trial hearing, defense counsel stated that the Honorable Rosa Trevino signed the commitment orders in De Luna's case.

FN59. Again, articles 45.045 and 45.050 allow *capias pro fines* to be issued for a person's arrest for an offense he or she committed before the age of seventeen under certain circumstances already explained. There is no evidence that appellant failed to comply with those articles when she issued the *capias pro fine* warrants for De Luna's arrest.

At trial and on appeal, the State relies on the theory of constructive arrest wherein the State argues once a person has been arrested for an offense, if a separate arrest warrant has been issued for that person, the person is then re-arrested on the warrants. At trial, although the State made this argument, it did not provide any evidence to the jury regarding the theory of constructive arrest.

However, in its brief, the State claims that De Luna's mother "indicated that [De Luna] had been arrested for failure to appear in January of 2010."The State supports its claim with the following colloquy between the prosecutor and De Luna's mother:

[Prosecutor]: Okay. Now, do you recall when your son was arrested on these [sic] failure to appear warrants or these truancy warrants?

A: It was back in January of last year.

[Prosecutor]: Okay. And did you inquire into how much he owed and how long he was going to have to spend in jail?

A: When I called, they told me that he was arrested for PI, and his—his bail was \$168, so I said, Okay, I'll be there shortly and take your—you this money so we can bail him out, but I was having problems obtaining that money, because at that time I was not employed.

And so later on I got the money together and called back and told them, Okay, I got the money, I'm going to go to the bail bondsman and have him bailed out, but they told me that he owed \$10,000 in tickets.

And I'm like, What? I'm like, From what? They said, From truancy. I'm like, But he already went to court for that. How can he be charged again? He already went to court for that. And they said, No ma'am, this has to do with the county. That was the State. And I'm like, But it's the same charge, so how are you charging me again? They said, Well, you go and speak to [appellant's] office, which I did the next day.

And then I spoke to some gentleman there, and I told him, How are you charging—I want to know what all these charges are about. Oh, well, these tickets have to do back when he was in seventh grade. And I go, It's taken you this long to notify me that he owes all this? And he said, The only way that he can get out is if you pay the amount of \$10,000. I go, But I don't have that amount. Can I make some kind of arrangements to pay? I have \$300 right now, and I can pay \$300 a month. And they said, No, they wanted the whole amount, \$10,000. I had—I didn't have that money.

On cross-examination, De Luna's mother agreed that De Luna was arrested for public intoxication. We disagree with the State's characterization of De Luna's mother's testimony. When read in context, De Luna's mother testified that De Luna was arrested for public intoxication. Although she agreed with the prosecutor's leading question asking when De Luna was arrested for "failure to appear," she then clarified that he was actually arrested for public intoxication. In addition, De Luna's mother explained that De Luna was not released from custody due to \$10,000 worth of tickets.

Next, the State asked, "And then [after his possession of marihuana charge was dis-posed of,] he [De Luna] was arrested on those offenses [the offenses for which appellant issued the warrants]?" Gonzalez, the Chief Public Defender, replied, "He was arrested for possession of marijuana, Class B misdemeanor, and he disposed of the case and he is continued [sic] to remain in custody on the offenses listed in Exhibit 2 [(the offenses for which appellant issued the warrants)]." Also, when the prosecutor attempted to elicit testimony from him that De Luna was arrested for "failure to appear," Gonzalez did not agree and stated that the Able Term system documented that De Luna was arrested for possession of marihuana, and held in jail due to the warrants signed by appellant. Again, the State did not allege that appellant subjected De Luna to unlawful continued confinement.

We acknowledge that Gonzalez agreed with the prosecutor when asked, that "in order for [De Luna] to have been in custody on those offenses, [De Luna] had to have been originally arrested for those" and responded "yes" when the prosecutor asked, "And in order for [De Luna] to have been in custody on those offenses, he had to have been originally arrested for those?" And Gonzalez "believed" that De Luna was arrested for those offenses. However, when asked by the State where the warrants issued by appellant were served, Gonzalez replied, "That, I don't know. Exactly I don't know where they were served." Moreover, Gonzalez admitted that in De Luna's case, he only conducted a " cursory review of the law", that he "wasn't confident" of his interpretation of the Juvenile Code, he sought advice from an employee of the district attorney's office, Schreiber, on the issue, and that he did not review De Luna's files from appellant's court or "do any kind of investigation." Gonzalez further testified that Schreiber "didn't understand what [Gonzalez] was saying" and informed Gonzalez that this area of the law is in his opinion "a gray area." The evidence must support a rational finding, and we cannot conclude that a rational juror could have concluded beyond a reasonable doubt that De Luna was arrested again pursuant to the warrants on the basis of Gonzalez's "belief." Instead, the undisputed evidence shows that those warrants were never served.

In its brief, the State also cites portions of testimony of appellant's court coordinator, Leal, for support that De Luna was arrested pursuant to the warrants signed by appellant. However, the portion of the record cited by the State is in the form of a voir dire conducted by the prosecutor during defense counsel's direct examination of Leal. Defense counsel attempted to elicit testimony from Leal regarding the judges who arraigned Trevino and De Luna. However, the State objected on the basis of hearsay. The trial court allowed the prosecutor to take Leal on voir dire. During the voir dire, the prosecutor asked, "And the arraignment at the County Jail, those—that's after [Trevino and De Luna] having been arrested on the warrants issued by Judge Mary Alice Palacios; is that correct," Leal replied, "Yes, ma'am." After the prosecutor completed the voir dire of Leal, the trial court sustained the State's objection to Leal's testimony regarding who arraigned De Luna and Trevino. The trial court allowed the above cited questions for the purpose of determining whether Leal's testimony was based on hearsay, and it sustained the State's hearsay objection. Therefore, we will not consider the prosecutor's voir dire of Leal as admitted evidence.

Also, the documentary evidence shows that the warrants signed by appellant for De Luna's arrest were not actually executed. Thus, the evidence in the record contradicts Gonzalez's testimony that he believed De Luna was arrested pursuant to the warrants signed by appellant. Each docket sheet from appellant's court in De Luna's cases states that on January 11, 2010, the "warrant[s] [were] recalled/Pending jail rpt fm HCSO." No one explained what was meant when appellant documented that the warrants had been recalled.

The State asked Leal, "So, essentially, that was—you are aware that Francisco De Luna was arrested and jailed and then you recall the warrant on this particular case," Leal re-plied, "Yes. It was recalled at the Sheriff's Office when he was served with it." However, when Leal made this statement, he was reviewing the one case that appellant did not transfer to the juvenile court. Thus, the State could not argue that appellant lacked jurisdiction to issue the warrant in that case. The State did not ask Leal to review any of the other warrants pertaining to De Luna. Therefore, there is no evidence that, in general, the notation "warrant recalled/pending jail report fm HCSO" meant that the warrant had been officially served. Leal simply stated that he remembered that in that particular case, the warrant had been served. Moreover, all of the warrants for De Luna's arrest filed by the HCSO's custodian of records have blank Officer's Return sections. In contrast, the Officer's Return in the commitment orders in Trevino's case filed by the HCSO's custodian of records is completed and documents that it was executed on August 4, 2009 at twelve o'clock p.m. The Officer's Return on the warrant for Diaz's arrest is also

completed and documents that it was executed on February 25, 2010 at 1:37 p.m. FN60

FN60. Although the State called the custodian of records, Faustina Tijerina, to testify, it did not ask her to explain the process of “constructive arrest” to the jury.

Nonetheless, even assuming without deciding that the arrest warrants had been served on De Luna and that he was in fact arrested pursuant to those warrants, there is no evidence that appellant knew her acts were improper in any way or that she was not justified when she issued those warrants as further explained below. The State alleged that appellant transferred all of De Luna's cases to the juvenile court. However, the “Docket Sheets” from appellant's court in De Luna's cases show that before appellant transferred De Luna's cases involving the tickets he received for the various offenses he committed, De Luna failed to appear in appellant's court on several of those cases. FN61 The docket sheets in De Luna's cases also show that before appellant transferred several of the cases, De Luna pleaded guilty to some of the charges, and appellant signed a judgment ordering De Luna to pay those fines. In those cases, the docket sheet shows that the court received the disposition letter from the juvenile center that De Luna's family did not respond for services. The disposition letter states that the offenses De Luna committed were contempt of court offenses. However, the disposition letter does not mention any of the class C misdemeanor offenses that De Luna pleaded guilty to committing in appellant's court.

FN61. The court of criminal appeals has stated that failure to appear before a judge is an offense and a warrant issued for that offense is expressly authorized under article 45.103 of the Texas Code of Criminal Procedure. *Black v. State*, 362 S.W.3d 626, 629, 637 (Tex.Crim.App.2012) (citing TEX.CODE CRIM. PROC. ANN. art. 45.103 (West, Westlaw through 2013 3d C.S.) (“If a criminal offense that a justice of the peace has jurisdiction to try is committed within the view of the justice, the justice may issue a warrant for the arrest of the offender.”)). In this case, the State presented no evidence that appellant's court lacked jurisdiction to issue the war-rants for De Luna's multiple failures to appear in her court or that these multiple failures to appear were not separate offenses from the cases she transferred to the juvenile court. See *id.* Moreover, the jury heard evidence that “failure to appear” is considered contempt of court. Thus, assuming *arguendo* that this is a jury issue, a rational juror could not have found beyond a reasonable doubt that appellant lacked jurisdiction to cite De Luna for his multiple instances of contempt of court. We note that the Black court stated that there is no rule requiring that the face of the arrest warrant identify the source for the issuing magistrate's finding of probable cause to arrest the defendant. *Id.* at 637.

In addition, the trial court admitted article 45.060 into evidence which allows a court that has “used all available procedures under this chapter to secure the individual's appearance to answer allegations made before the individual's 17th birthday, the court may issue a notice of continuing obligation to appear.” See TEX.CODE CRIM. PROC. art. 45.060. The notice of continuing obligation requires that the court warn the individual that failure to appear pursuant to the notice of continuing obligation may be an additional offense and result in a war-rant being issued for the individual's arrest. See *id.* In this case, evidence was presented that De Luna failed to appear in appellant's court on multiple occasions before she transferred the cases, that appellant sent out the so-called “birthday letters” after De Luna turned seventeen, and that De Luna again failed to appear in her court.

The record also shows that appellant summoned De Luna to appear in her court after he turned seventeen possibly for his failure to appear or in order to pay the fines appellant ordered him to pay. The State presented no evidence that a justice court that has transferred cases involving violations, such as, for example, truancy, to the juvenile court loses jurisdiction over the failure to appear charges committed in the justice court prior to the transfer and that the justice court is not authorized to send the so-called “birthday letter” to that person for the separate offense of failure to appear in the justice court prior to the transfer. FN62 From our review of the record, it appears that appellant transferred the cases to the juvenile court to determine whether De Luna's multiple failure to appear violations in her court constituted contempt-of-court. This explains why the disposition letter from the juvenile court states that De Luna was put on probation for contempt of court offenses and that appellant's court was the complainant in those cases. The disposition letter does not concern De Luna's class C misdemeanor offenses because appellant's court was not the complainant in the class C misdemeanor cases against De Luna, and those complaints were filed by school district personnel for offenses committed at school—not for contempt of court.

FN62. We make no legal determination regarding whether appellant's court had jurisdiction under these circumstances. Instead, we are merely reviewing the evidence to determine whether the State met its burden of proving beyond a reasonable doubt that appellant's acts were unlawful under its theories. Whether her court lacked jurisdiction over De Luna's failure to appear violations is a question of law that is not for the finder of fact to determine. We do not intend to imply that the State could have proven that appellant's court lacked jurisdiction as a matter of fact in this case.

The State presented no evidence regarding the procedure that a justice and juvenile court must follow when the justice court transfers a case to the juvenile court for a de-termination of whether the defendant committed contempt of court. The State had this burden because its theory was that appellant's transfer orders resulted in her court losing jurisdiction over De Luna's cases. The evidence presented to the jury does not include the juvenile court records. The State did not explain what happened to the class C misdemeanor offenses that De Luna pleaded guilty to committing in appellant's court. The evidence undisputedly shows that De Luna pleaded guilty to those offenses, and appellant ordered him to pay the fines for those offenses prior to appellant's transfers to the juvenile court.FN63Without any of this information, even assuming arguendo it is a jury issue, the jury was in no position to determine whether appellant's court lacked jurisdiction.FN64

FN63. This is where we believe the confusion occurred. Appellant signed the transfer orders listing the class C misdemeanor offenses. However, the documentary evidence shows that the juvenile court disposed of contempt-of-court charges against De Luna. We cannot explain such a discrepancy, and the State made no attempt to do so. Moreover, this does not support a finding that appellant's court lacked jurisdiction.

FN64. As set out earlier, it is our interpretation of the law that a jury is not entitled to make the legal determination of whether a court has jurisdiction. However, we are merely explaining that the State failed to fully explain to the jury its own theory that appellant's court lacked jurisdiction.

Moreover, appellant's court sent De Luna several notices of continuing obligation regarding the underlying class C misdemeanor offenses ordering that De Luna appear in appellant's court because those causes of action were still pending. It is undisputed that De Luna failed to appear when summoned pursuant to the notices of continuing obligation, also called the "birthday letters" by the State. Article 45.060, which was admitted into evidence and reviewed by the jury, states that a court that "has used all available procedures under this chapter to secure the individual's appearance to answer allegations made before the individual's 17th birthday" may issue a notice of continuing obligation to appear in that court. TEX.CODE CRIM. PROC. ANN. art. 45.060(b). "Failure to appear as ordered by the notice under Subsection (b) is a Class C misdemeanor independent of section 38.10, Penal Code, and Section 543.003, Transportation Code."Id. art. 45.060(c). However, article 45.060 does not state that there are any exceptions allowing a person to disregard the notice of continuing obligation and not appear to answer for those charges. Thus, De Luna was required to appear when summoned and inform appellant of the fact that he had already been punished

by the juvenile court for those offenses, if that had in fact happened. De Luna did not testify that he disregarded the notice of continuing obligation because appellant's court lacked jurisdiction or because he believed that appellant was violating double jeopardy principles. Instead, the evidence presented show that failure to appear after receiving the notice of continuing obligation is a separate class C misdemeanor offense from the underlying charges. The undisputed evidence shows that De Luna failed to appear in appellant's court after he turned seventeen and therefore, committed separate class C misdemeanor offenses of failure to appear after being summoned, which is punishable by arrest. Appellant then issued the warrants for De Luna's arrest.

We conclude that based on the complexity of the issue before the jury, the evidence does not support an inference that appellant knew that her act of issuing the warrants for De Luna's arrest was in any way improper. This is so because the only evidence presented shows that appellant's interpretation of the law was different from the State's interpretation and from witnesses' interpretation. Our conclusion is further supported by the evidence that De Luna failed to appear in appellant's court after receiving the letters of continuing obligation, which is a class C misdemeanor. Thus, the evidence does not support a finding that appellant knew that her court lacked jurisdiction, even if it did.FN65

FN65. Again, even if her court did lack jurisdiction, the remedy for a court acting without jurisdiction, which is not uncommon, is reversal on appeal, not criminal punishment.

Furthermore, although the State insisted that appellant's court did not have jurisdiction and that the disposition letter did not grant her court jurisdiction, Cherry testified that she understood the letter as giving appellant's court jurisdiction. However, even if the letter did not mean what Cherry claimed, the State was still required to prove beyond a reasonable doubt that appellant knew that her court lacked jurisdiction or that De Luna had already been punished for the offenses. As explained above, it did not do so. As set out in detail above, the evidence clearly shows that the State's witnesses were confused by the transfer orders and the disposition letter.FN66 The State's theory was that appellant knew she lacked jurisdiction because the law is so clear. We disagree.

FN66. We are not able to determine from the limited information admitted at appellant's trial the effect that the transfer orders and disposition letter had on De Luna's cases.

Finally, we conclude that the evidence does not support a finding that appellant was not justified when she signed the warrants for De Luna's arrest because

the undisputed evidence shows that he failed to appear in appellant's court after her court sent him the letters of continuing obligation; thus, he committed a separate class C misdemeanor offense for which appellant could have reasonably believed allowed her to sign the warrants. Moreover, the State cites no authority, and we find none, making it unlawful as defined by the penal code for a trial judge to perform her statutory duties even if it is later determined as a matter of law that the court lacked jurisdiction to act. In addition, the State cites no authority, and we find none, making jurisdiction of appellant's court an element of the offense of official oppression. Thus, although we usually give the jury deference to believe or disbelieve the witnesses, in this case, whether appellant's court lacked jurisdiction to sign the warrants was a question of law and not one of fact for a jury to decide. We conclude that appellant acted with a reasonable belief that her court had been granted jurisdiction to do the complained-of acts; therefore, she did not know that the act of signing the arrest warrants was unlawful, if it was. See *id.* § 39.03(a)(1). Accordingly, we conclude that the evidence was insufficient to support the jury's verdict that appellant committed the offense of official oppression under these facts. We sustain appellant's first, second, and third issues.

Conclusion: Having concluded that the evidence is insufficient to support the jury's finding that appellant committed two counts of official oppression, we must acquit appellant. See *Aldrich v. State*, 296 S.W.2d 225, 230 (Tex.App.-Fort Worth 2009, pet. ref'd); *Jacobs v. State*, 230 S.W.3d 225, 232 (Tex.App.-Houston [14th Dist.] 2006, pet. ref'd) (citing *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App.1996) (en banc)). We therefore re-verse the judgment, dismiss the indictments, and render a judgment of acquittal in both counts. FN67

FN67. Having rendered a judgment of acquittal, we do not reach appellant's remaining issues.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

IN DISCRETIONARY TRANSFER TO ADULT COURT, A HEAVY CASELOAD AND A MISTAKE AS TO JUVENILE'S AGE BY LAW ENFORCEMENT WAS NOT CONSIDERED A REASON BEYOND THE STATE'S CONTROL BECAUSE LAW ENFORCEMENT IS CONSIDERED WITHIN STATE'S CONTROL UNDER TFC §54.02(j)(4)(A).

¶ 14-3-11. **Moore v. State**, No. 01-13-00663-CR, --- S.W.3d ---, 2014 WL 3673551 [Tex.App.-Hous. (1 Dist.), 7/24/14]

Facts: Aaron Moore was born on July 11, 1992. On or about August 29, 2008, six-teen-year-old Moore sexually assaulted a twelve-year-old, E.W. On September 19, 2008, E.W. identified Moore as her

assailant and reported the incident to her mother, who in turn reported this information to the police. Three days later, while Moore was still sixteen, Detective M. Cox began to investigate E.W.'s complaint.

Almost two years' later, on July 22, 2010, Detective Cox forwarded Moore's case to the district attorney's office, believing Moore to be seventeen years old. Moore, however, had turned eighteen eleven days earlier. In delaying forwarding the charges, Detective Cox testified that she relied on an internal police report that mistakenly listed Moore's birthday as July 11, 1993, making him appear one year younger than his actual age. CPS records in the police file contained Moore's correct date of birth. Detective Cox also testified that she had a heavy caseload of 468 cases at the time.

On September 8, 2010, the juvenile court ordered that Moore be taken into custody, and then ordered his conditional release a few days later. More than a year later, on August 17, 2011, the State filed a petition for a discretionary transfer of the case from the juvenile court to a criminal district court. On February 10, 2012, the juvenile court transferred the case, concluding that, for a reason beyond the control of the State, it was not practicable to proceed in juvenile court before Moore's eighteenth birthday. See *id.* Moore pleaded guilty to aggravated sexual assault of a child pursuant to a plea bargain; the criminal district court deferred adjudication and placed Moore on five years' community supervision.

Moore contends that the juvenile court improperly transferred the case to the criminal district court because the State failed to show that, for a reason beyond the control of the State, it was not practicable to proceed in juvenile court before Moore's eighteenth birthday.

Held: Judgment vacated, case dismissed

Opinion: We review a juvenile court's decision to transfer a case to an appropriate court for an abuse of discretion. *State v. Lopez*, 196 S.W.3d 872, 874 (Tex.App.-Dallas 2006, pet. ref'd); see also *In re M.A.*, 935 S.W.2d 891, 896 (Tex.App.-San Antonio 1996, no writ). In applying this standard, we defer to the trial court's factual determinations while reviewing its legal determinations de novo. *In re J.C.C.*, 952 S.W.2d 47, 49 (Tex.App.-San Antonio 1997, no writ).

A juvenile court has exclusive, original jurisdiction over all proceedings involving a person who has engaged in delinquent conduct as a result of acts committed before age seventeen. See TEX. FAM.CODE ANN. §§ 51.02(2), 51.04 (West 2014). A juvenile court does not lose jurisdiction when a juvenile turns eighteen, but its jurisdiction becomes limited. The juvenile court retains jurisdiction to either transfer the case to an appropriate court or to dismiss the case. In

re B.R.H., 426 S.W.3d 163, 166 (Tex. App. -Houston [1st Dist.] 2012, orig. proceeding) (citing *In re N.J.A.*, 997 S.W.2d 554, 556 (Tex.1999)). To transfer the case to an appropriate court, the State must satisfy the requirements listed in section 54.02(j).TEX. FAM.CODE ANN. § 54.02(j), which reads:

The juvenile court may waive its exclusive original jurisdiction and transfer a person to the appropriate district court or criminal district court for criminal proceedings if:

- (1) the person is 18 years of age or older;**
- (2) the person was:**
 - (A) 10 years of age or older and under 17 years of age at the time the person is alleged to have committed a capital felony or an offense under Section 19.02, Penal Code;**
 - (B) 14 years of age or older and under 17 years of age at the time the person is alleged to have committed an aggravated controlled substance felony or a felony of the first degree other than an offense under Section 19.02, Penal Code; or**
 - (C) 15 years of age or older and under 17 years of age at the time the person is alleged to have committed a felony of the second or third degree or a state jail felony;**
- (3) no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted;**
- (4) the juvenile court finds from a preponderance of the evidence that**
 - (A) for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person; or**
 - (B) after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because:**
 - (i) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person;**
 - (ii) the person could not be found; or**
 - (iii) a previous transfer order was reversed by an appellate court or set aside by a district court; and**
 - (5) the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged.**

Pursuant to section 54.02(j), the juvenile court may transfer the case to a criminal district court only if, among other findings, it determines by a preponderance of the evidence that “for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person.”*Id.* § 54.02(j)(4)(A). The State has the burden of showing that proceeding in juvenile court was not practicable because of circumstances outside the control of the State. See *Webb v. State*, 08–00–00161–CR, 2001 WL 1326894, at *7 (Tex.App.-El Paso,

Oct. 25, 2001, pet. ref'd) (mem. op., not designated or publication).

In *Webb*, the El Paso Court of Appeals considered the State's burden under section 54.02(j) and held that the State failed to satisfy it. *Id.* There, the State claimed that the delay resulted from the trial court staff's failure to set a prompt hearing. *Id.* at *5. Law enforcement filed the defendant's case with the district attorney's office. *Id.* at *2. A few days later, the State filed in juvenile court a petition for a discretionary transfer of the case to criminal district court, but failed to notify the juvenile court of the defendant's upcoming eighteenth birthday. *Id.* at *2, *6. At a hearing after the defendant's eighteenth birthday, the juvenile court transferred the case to a criminal district court. *Id.* at *2. The court of appeals reversed, holding that the State's failure to notify the juvenile court of the defendant's upcoming birthday was not a reason for delay beyond the State's control. *Id.* at *7.

Here, the State contends that an investigative delay, stemming from Detective Cox's large caseload and mistake as to Moore's age, are reasons beyond the control of the State. The State concedes, however, that the offense was promptly reported and that Moore had been identified as the perpetrator within days after the offense was committed while he was still a juvenile and well short of his seventeenth birthday. The correct birthdate was evident in other police records. The State did not trace its error in the internal offense report to any outside source—Detective Cox testified that the report would have been created internally by an administrative assistant. The record demonstrates that it was the State's clerical error, coupled with its lengthy delay—unaided by any outside event—which caused the case to fall outside the juvenile court's jurisdiction. The State did not adduce proof that it could not have proceeded in juvenile court for reasons beyond its control.

The State attempts to distinguish *Webb* by emphasizing that Detective Cox forwarded Moore's case to the district attorney's office after Moore's eighteenth birthday—and that it was an investigative delay, not a prosecutorial delay, that caused the State to file charges after the time for filing them had expired. But for purposes of section 54.02(j)(4)(A), we include law enforcement as part of “the State.” Cf. *In re N.M.P.*, 969 S.W. 2d 95, 101–02 (Tex.App.-Amarillo 1998, no pet.)(including law enforcement as part of “the State” for purposes of section 54.02(j)(4) due diligence exception). We analogize this case to the *Brady v. Maryland* line of authority, in which courts include law enforcement's conduct and knowledge of exculpatory evidence in determining a *Brady* violation. See *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 1567 (1995) (discussing rule announced in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963)). For purposes of the *Brady* rule, “the State” includes, in

addition to the prosecutor ... members of law enforcement connected to the investigation and prosecution of the case.” *Pena v. State*, 353 S.W.3d 797, 810 (Tex.Crim.App.2011) (citing *Ex parte Reed*, 271 S.W.3d 698, 726 (Tex.Crim.App.2008)).

Because “the State” includes law enforcement, we hold that Detective Cox’s heavy caseload and mistake as to Moore’s age are not reasons beyond the State’s control. Accordingly, we hold that the juvenile court erred in finding that the State had satisfied its burden under section 54.02(j)(4)(A).

The State contends that any error in transferring the case to a criminal district court was harmless, because the juvenile court could have transferred the case under section 54.02(a). TEX. FAM.CODE ANN. § 54.02(a). But section 54.02(a) applies only to a “child” at the time of the transfer. *Id.* The Family Code defines “child” as a person who is:

(A) ten years of age or older and under 17 years of age; or
(B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

Here, the State moved to transfer the case to a criminal district court on August 17, 2011. At the time, Moore was nineteen years old and thus not a “child.” See *id.* To transfer the case to a criminal district court after a person’s eighteenth birthday, the juvenile court must find, by a preponderance of the evidence, that the State has satisfied the section 54.02(j) requirements—that the delay happened for reasons outside the control of the State. *Id.* § 54.02(j); N.J.A., 997 S.W.2d at 557 (“If the person is over age eighteen, and section 54.02(j)’s criteria are not satisfied, the juvenile court’s only other option is to dismiss the case.”).FN1 Because the State did not meet this burden, its non-compliance with section 54.02 deprived the juvenile court of jurisdiction. We therefore hold that the juvenile court lacked jurisdiction to transfer the case to a criminal district court and, as a result, the criminal district court never acquired jurisdiction. See *Webb*, 2001 WL 1326894, at *7.

FN1. We note that the Family Code provides an exception to this rule, which applies to incomplete proceedings. TEX. FAM.CODE ANN. § 51.0412 (West 2014); see also *B.R.H.*, 426 S.W.3d at 166. This exception, however, does not apply here, and neither party raises it as an issue.

Conclusion: We vacate the trial court’s judgment and dismiss the case for lack of jurisdiction.

